83-1481

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BERNARD PUNIKAIA, *et al.*,

Petitioners,

vs.

CHARLES CLARK, Director of the Department of Health for the State of Hawaii, Individually and in his Official Capacity,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether patients who move into an unsafe treatment facility to protest its closure have a constitutional right to a hearing before the state closes the facility where:

a. state law does not confer a substantive right on the residents to remain at the facility;

b. state law does not purport to limit the discretion of the state to close the facility and transfer its residents to a new facility; and

c. The facility's closure does not reduce or terminate the residents' care, but merely requires them to obtain care at a new facility?

2. Wheher a state may terminate utility services at an unsafe treatment facility eight months after its closure without first providing a constitutional due process hearing to patients who voluntarily chose to stay at the closed facility?

3. Whether this court should overrule its long line of cases which hold that a grievous loss (*e.g.*, transfer trauma) alone does not confer an independent right to due process under the Fourteenth Amendment to the United States Constitution?

4. Whether the plethora of hearings provided Petitioners satisfied any putative right they may have had to due process?

LIST OF THE PARTIES AFFECTED

There being no list submitted by Petitioners of the parties affected, Respondent submits that, except for the persons listed in the caption, there are no other parties affected by this case.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Respondent, Charles Clark, respectfully prays that a Writ of Certiorari not issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The March 5, 1982 decision of the United States District Court for the District of Hawaii, denying injunctive relief to Petitioners and granting summary judgment to the Respondent, is unreported and reprinted herein as Appendix A.

The March 29, 1982, judgment of the district court is unreported and reprinted herein as Appendix B.

The September 21, 1978, Memorandum and Order of the district court is unreported and reprinted herein as Appendix C. Contrary to Petitioners' erroneous claim that this decision was reversed by *Brede* v. *Director for the Department of Health*, 616 F.2d 407 (9th Cir. 1980) (*see* Petition, at 7), it is clear that *Brede* only remanded Judge Dick Yin Wong's decision "for further proceedings" (*see* Appendix I, at A-10).

STATEMENT OF THE CASE

The issue in this case is whether the United States Constitution prevents state officials from closing a termite-ridden and unsafe leprosy treatment facility and transferring its program to a new facility 12 miles away without first providing due process.

One state court judge, one federal magistrate, three federal district judges, and a panel of the Ninth Circuit have ruled that Petitioners have no constitutional due process right to a hearing and to remain at the facility before the State closed it.

In addition, *Brede* v. *Director for the Department of Health*, (Appendix I, at A-7-8), observed that the Hawaii "statutes appear to authorize patient transfers 'at will' and therefore the Hale Mohalu residents [*i.e.*, Petitioners] would enjoy no more than a 'unilateral expectation' to continued services at that facility."

Nothing in state law substantively fetters the discretion of state health officials from closing unsafe leprosy treatment facilities. Therefore, there is no basis for finding a predicate to invoke the Due Process Clause in this case.

A. INTRODUCTION

The affliction of leprosy evokes deep and obvious sympathies in mankind. Until modern times, the disease was incurable and largely misunderstood. As a result, since time immemorial, it has been the cause of shock and fear. Treatment was limited to exile or worse.

Since the 1940's, however, society's treatment and perception of leprosy changed with the discovery of new medicines. With these medical breakthroughs, the disease could be arrested and patients could, for the first time, live in the community, as over 600 now do in Hawaii. Appendix A, at 3a. Others are offered free life-time room, board, clothing, medical care and transportation at the Kalaupapa settlement on the island of Molokai. *Id.*, at 1a-2a.

Since the inception of this lawsuit, however, the Petitioners have exploited the obviously emotional aspects of leprosy. They have also attempted to characterize the state's actions as being callous and indifferent in regard to their special needs.[1]

Nothing could be further from the truth. Every trial judge who has reviewed and become familiar with the facts of this case has rejected the Petitioner's claims. As Judge Martin Pence observed, after a five-day hearing, "[i]t should appear obvious to anyone who was familiar with the factual background of this case that the plaintiffs' case is entirely without any merit whatsoever. . . ." *Id.*, at 43a.

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[1] In their opening brief below, for example, petitioners disingenuously compared the State of Hawaii with a South American dictatorship. O.B., at 55.

One Hawaii state circuit judge, one federal magistrate, three federal judges, and a Ninth Circuit panel have so ruled.

The State of Hawaii has also acted with compassion for Petitioners. They "are now receiving more assistance from the people of Hawaii than is given to those suffering, for example, from muscular dystrophy, or cancer, or heart attacks." *Id.*, at 46a. Since 1976, they have also been given the right to live free at Kalaupapa on the island of Molokai for life. *Id.*, at 6a-7a.

The emotional sympathies that leprosy engenders should be not used as a shield to hide the fact that Hawaii has surpassed its statutory and constitutional duties to the Petitioners.

B. STATEMENT OF THE FACTS

A complete statement of the facts of this case is set forth in Judge Pence's decision (Appendix A). In order to place Petitioners' emotional Statement into perspective, the following uncontroverted facts are highlighted.

The Hale Mohalu leprosy treatment "facility was established on federal land [on the island of Oahu] in the 1940's. . . . In 1956, the federal government conveyed the land . . . to the State of Hawaii," conditioned on the obligation to maintain a leprosarium for 21 years. Appendix II, at A-13. In 1977, the State's title to the property "became absolute." *Id.*

On January 26, 1978, the State of Hawaii officially closed the dilapidated leprosy treatment facility, known as Hale Mohalu, at Pearl City, Oahu, and reassigned its program on the grounds of Leahi Hospital at Diamond Head. Appendix A, at 17a.

That day, all permanent residents of Hale Mohalu moved to Leahi. The Petitioners, on the other hand, were permanent residents of Kalaupapa on the Island of Molokai who remained at or moved into Hale Mohalu principally to protest its closure. *Id.*, at 43a-44a.

The facility's closure was neither a hasty one nor an arbitrary one. *Id.*, at 12a. Indeed, in 1969, the Petitioners themselves recommended that the State close Hale Mohalu and reestablish the program in the vicinity of Leahi.[2]

In the years that followed, numerous studies were conducted and no less than "23 hearings" (Appendix A, at 12a.) were held in public "with patients and patients' representatives, and an attorney for those patients" (*id.*, at 13a) regarding the proposed closure.

The reason for the 1978 closure was that the facility had dilapidated to such an unsafe condition that the Petitioners' own structural engineer admitted that "to say this building is structurally safe would be foolhardy." R.T., at 51:23-52:1; and Appendix A, at 14a.

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[2] In 1969, the Citizens Committee on Hansen's Disease unanimously recommended that Hale Mohalu be closed and the residents transferred to Leahi. *Id.*, at 3a-4a; R. T., at 349:25-350:6. It is undisputed that Bernard Punikaia, representing all of the patients at Kalaupapa (R. T., at 393:8-10), and Anita Una, representing all of the patients at Hale Mohalu, voted for the transfer (R. T., 393:19-20):

"QUESTION [BY MR. LILLY] You agreed with the transfer recommendation of Hale Mohalu to something in proximity to Leahi Hospital?

"ANSWER [BY MR. PUNIKAIA] Yeah.

"QUESTION Did Anita Una agree with that recommendation?

"ANSWER Yes, yes." R. T., at 394:13-17.

Between the January 26, 1978, closure and September 1, 1978, the state made every effort to encourage the patients, who voluntarily chose to remain at or move into the facility, to leave. They were given advance notice that the state would shut off utilities on September 1. That shut-off was not a "pre-dawn raid," as Petitioners continue to describe it. Rather, they had actual advance *notice* that the utilities would be terminated on that date. R.T., at 416:11-24.

The new facility at Leahi was described by one of the Petitioners as "beautiful." R.T., at 193:24-25. It is a two-story, multiroom house on the slopes of Diamond Head above Waikiki. One would have to be a millionaire to own it. Appendix A, at 40a-43a; and R.T., at 640-643.

The State of Hawaii is not unmindful of the plight of those afflicted with the scourge of leprosy. We sympathize with and have empathy and compassion for them. However, the State has fulfilled its moral obligation to the patients. They are free to live at Kalaupapa on Molokai or Leahi on Oahu or return, with no societal or legal restraints, to the community where over 600 other patients are now living relatively normal lives.

Respondent asks this court to recognize, as has every trial court below, "that the plaintiffs' claims were, and are, entirely without merit." Appendix A, at 62a.[3].

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[3] On September 21, 1983, the remaining patients at Hale Mohalu were evicted and all structures thereon razed. The facility no longer exists and none of the Petitioners now reside there.

ARGUMENT

I

The Decision To Close Hale Mohalu And Reassign Its Program To A New Facility Did Not Implicate A Property Interest Protected By The Due Process Clause.

O'Bannon v. *Town Court Nursing Center*, 447 U.S. 773 (1980) supports the Ninth Circuit's conclusion that Petitioners had, under the Hawaii statutes, no legitimate expectation of continued residency at Hale Mohalu. Thus, under the rule of *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), the Petitioners' abstract desire for continued residency was insufficient to invoke the Due Process Clause.

In *O'Bannon*, this court held that "patients have no interest in receiving benefits for care in a particular facility that entitles them, as a matter of constitutional law, to a hearing" (*id.*, at 784) where:

1. federal laws "do not confer a right to continued residence in the home of one's choice" (*id.*, at 785);

2. federal laws "do not purport to limit the Government's right" to transfer patients (*id.*);

3. "decertification does not reduce or terminate a patient's financial assistance, but merely requires him to use it for care at a different facility" (*id.*, at 785-786); and

4. the fact that "some residents may encounter severe emotional and physical hardship as a result of a transfer" (*id.*, at 784 n. 16) does not mean that the facility's closure constitutes "a governmental decision to impose that harm" (*id.*, at 789).

In arguing that *O'Bannon* applies only to indirect termination of benefits, Petitioners seriously misconstrue the import of the *O'Bannon* decision.

The Ninth Circuit in *Bumpus* v. *Clark*, 681 F.2d 679, 687 (9th Cir. 1982), *dismissed as moot* (nursing home closed), 702 F.2d 826 (1983), correctly held that the *O'Bannon* reasoning "applies with equal force" to the voluntary (*i.e.*, direct) withdrawal of services by a county-owned nursing home.

The *O'Bannon* reasoning applies because no constitutional distinction can be made between indirect and direct terminations. The legitimacy of Petitioners' expectancy of continued residence at Hale Mohalu is defined, not by the direct or indirect nature of state action, but by the "contours of the right[s] conferred by the statutes and regulations" in Hawaii. *O'Bannon*, 447 U.S. at 786.

Because Hawaii laws confer unlimited discretion on state officials to make transfer decisions for any reason or no reason at all, the Petitioners have "no enforceable expectation of continued benefits" at Hale Mohalu. *O'Bannon*, 447 U.S. at 786.

The indirect/direct analysis in *O'Bannon* was significant because it served to describe the legitimacy of the patients' expectations under the contours of federal law. The more indirect the relationship, the more likely that the citizens' expectation will be but an abstractioon. Conversely, the more direct the relationship, the more likely that the citizens' expectation will be based upon a concrete and legitimate right.

Still, regardless of whether governmental action is defined as either direct or indirect, a citizen is not entitled to due process unless he first has a legitimate right to the benefit the government seeks to withdraw. If, for example, state law had permitted the unfettered withdrawal of utility services in *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978), then the direct

government action of terminating utility services would not have triggered due process because the citizens would have had no legitimate entitlement to continued services. Because continued services were defeasible only "for cause" in that case, the Due Process Clause was triggered.

Similarly, the direct government action of transferring an inmate thousands of miles away to another state did not trigger due process in *Olim* v. *Wakinekona*, ____ U.S. ____, 75 L.Ed.2d 813 (1983), because state regulations conferred no more than a unilateral expectation of continued residency in Hawaii prisons. *Accord*, *Meachum* v. *Fano*, 427 U.S. 215 (1976); *Montanye* v. *Haymes*, 427 U.S. 236 (1976); *Greenholtz* v. *Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979); *Connecticut Board of Prisons* v. *Dumschat*, 452 U.S. 458 (1981); *Jago* v. *Van Curen*, 454 U.S. 14 (1981) (*per curiam*); and *Hewitt* v. *Helms*, 74 L.Ed.2d 675 (1983).

Thus, just because *O'Bannon* found that indirect deprivations did not trigger due process, one may not say, *a fortiori*, that direct deprivations do. On the contrary, due process still depends upon a legitimate state-created entitlement and, as will be explored herein, nothing in Hawaii law can be viewed as giving Petitioners more than a unilateral expectancy of continued residency at Hale Mohalu. For that reason, the—albeit direct—governmental action of terminating the Hale Mohalu program did not trigger in Petitioners the right to constitutional due process.

A. State Law Does Not Confer A Substantive Right On Petitioners To Remain At Hale Mohalu And Does Not Purport To Limit The Discretion Of State Officials To Close Hale Mohalu And Transfer Its Program To A New Facility.

Every federal and state court to have considered the question has ruled that Hawaii law does not purport to limit or fetter the discretion of state officials to reassign leprosy treatment facilities in Hawaii.

This is significant, for the interpretation of State laws by federal and state judges who sit in the affected state and "have practiced law there for many years" should be accepted unless palpably incorrect. *Bishop* v. *Wood*, 426 U.S. 341, 344-345 (1976).

Where, under state law, the "decisionmaker is not 'required to base its decisions on objective and defined criteria,' but instead 'can deny the requested relief for any constitutionally permissible reason or for no reason at all,' [citation omitted], the State has not created a constitutionally protected liberty interest." *Olim* v. *Wakinekona*, 75 L.Ed.2d at 823.

And that has been the conclusion of every state and federal judge sitting in Hawaii regarding the discretion of Respondent in this case:

First, State Circuit Judge Harold Shintaku, in *Punikaia* v. *Yuen*, Civ. No. 53577 (First Circuit, Haw.) concluded that "Section 326-3, Hawaii Revised Statutes, overrides all other laws (including rules and regulations) and authorizes the Department of Health to make arrangements at Leahi Hospital for the care and treatment of any person within the state affected with leprosy." Appendix A, at 53a.

Second, in examining this same issue, United States District Judge Dick Yin Wong held on September 21, 1978, that:

> Section 326-3 therefore confers unlimited discretion on the Department of Health to make arrangements for the "care and treatment" of persons afflicted with leprosy, "[n]otwithstanding' § 326-11." Appendix C, at 68a.
>
> * * *
>
> The pertinent Hawaii laws do not contain standards governing the Department of Health's exercise of discretion in the care and treatment of persons afflicted with leprosy. *Id.*

Third, United States District Judge Martin Pence reviewed § 326-3 and determined that "there is nothing to be found in the legislative history which even inferentially inhibits the Department of Health from moving the Hale Mohalu care program to any other site." Appendix A, at 54a.

Finally, the Ninth Circuit deferred to these interpretations which, it concluded, were "not clearly wrong." Appendix II, at A-17.

To the extent that the Petitioners doubt that Respondent's discretion under Hawaii law is truly unfettered, they doubt the ability or authority of the Hawaii state courts and the lower federal courts to construe state law. *See Olim*, 75 L.Ed.2d at 823 n. 10.

B. Hale Mohalu's Closure Did Not Reduce Or Terminate The Petitioners' Care, But Merely Required Them To Obtain Care At A New State-Operated Facility.

The closure of Hale Mohalu did not result in any more of a reduction or termination of benefits than the decertification of the facility in *O'Bannon*. In both cases,

the patients were merely required to obtain benefits at another facility.

Moreover, as the Ninth Circuit observed, any harm occasioned by the "state's termination of utility services was self-inflicted because the patients voluntarily remained [for eight months] after the facility was closed." Appendix II, at A-23.

Because Petitioners did not suffer a reduction or termination of their benefits, they were not entitled to a due process hearing before Hale Mohalu was closed.

C. The Mere Possibility Or Existence Of Transfer Trauma Or Any Other "Grievous Loss" Does Not Alone Confer An Independent Right To Due Process.

This court should not overrule its long line of cases which hold that a grievous loss (*e.g.*, transfer trauma) does not confer an independent right to due process.

It is the nature of the loss rather than its magnitude which determines whether due process is triggered. *Meachum* v. *Fano*, 427 U.S. at 224. Thus in *Jago* v. *Van Curen*, 454 U.S. at 17, this court held that the grant of parole could be withdrawn without due process even though it recognized that "respondent suffered 'grievous loss' . . ."

Similarly, in *O'Bannon*, this court found "unpersuasive" arguments to the effect that "transfer trauma" independently triggered the Due Process Clause:

> Nevertheless, we assume for purposes of this decision that there is a risk that some residents may encounter severe emotional and physical hardship as a result of a transfer. 447 U.S. at 784 n. 16.

"Transfer trauma" is nothing more than a form of "grievous loss." Given the unbroken line of precedent laid down by *Roth*, *Meachum* v. *Fano*, *Jago* v. *Van Curen*,

and numerous other cases, it seems ineluctable that reference to "transfer trauma" is insufficient as an independent predicate for a due process claim.[4]

II

Assuming Petitioners Were Entitled To Due Process, The State Provided Them With All The Process To Which They Were Due.

The touchstone of procedural due process may be characterized as fundamental fairness, and no particular set of procedures is mandated for all situations. We contend that under any reasonable analysis, the Petitioners were provided more than adequate due process.

Judge Pence observed that, before the Hale Mohalu facility was closed, Petitioners were given "at least 23 hearings on the subject. . . ." Appendix A, at 12a. He concluded that, if the Petitioners "did have a 'property interest' in remaining . . ., the record indicates that all of the plaintiffs were provided adequate notice, opportunity to be heard, were heard, and were clearly and fully notified of the proposed state action long before and up to the very last day of intended transfer." *Id.*, at 47a-48a.

Moreover, Petitioners stipulated during the hearing below that, before the closure, the State Health Planning and Development Agency held four hearings on the transfer of the Hale Mohalu program. R.T., at 571-573. Petitioners were provided advance notice (*id.*, at 572:25) and were given opportunities to comment on the plan (*id.*, at 572:19-23), including the right to have an attorney repre-

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[4] Even if transfer trauma could trigger due process, it would not apply to the Petitioners, "all of whom were from Kalaupapa" and thus had, at best, a mere transient interest in Hale Mohalu. Appendix C, at 22a.

sent them at those hearings (*id.*). *See also*, Appendix A, at 48a.

Under any reasonable analysis of the Due Process Clause, Petitioners were provided more than adequate due process.

III

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be DENIED.

DATED: Honolulu, Hawaii, May ____, 1984.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 78-0336
Decision on Remand; Decision on Summary Judgment; Judgment

BERNARD PUNIKAIA, DAVID BREDE, FRANK DUARTE, MARY DUARTE, CLARENCE NAIA, FRANCIS PALEA, BERNICE PUPULE, RICHARD PUPULE, SAM KALIKO, PAUL HARADA, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

vs.

GEORGE A. L. YUEN, Director of the Department of Health for the State of Hawaii, individually and in his official capacity,

Defendant-Appellee.

DECISION ON REMAND; DECISION ON SUMMARY JUDGMENT; JUDGMENT

BACKGROUND FACTS*:

Although the Court of Appeals, in *Brede vs. Director for Dept. of Health, etc.*, 616 F.2d 407 (1980) detailed some of the history of the treatment of "lepers" in Hawaii, its resume' did not attempt to be complete. Leprosy was introduced by immigrant laborers into the Kingdom of Hawaii around the 1850-60's. From time immemorial, leprosy and its control plagued almost every society throughout the world until the discovery, in the late 1940's, of drugs which could arrest the disease and curtail its spread. Until that time, the only method of preventing the spread of the disease was to isolate those infected so

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* *All* statements of facts made hereafter are to be deemed Findings of Facts by this judge.

that they could not have contact with other members of society. During the Kingdom of Hawaii, just such a place of isolation was instituted on what is now known as Kalaupapa on the Island of Molokai. The Kingdom, the Republic, the Territory, and the State of Hawaii, successively, have provided, without charge, homes, hospitals, food, clothing, and transportation, as well as other community services for those so afflicted.

Not too long after the territorial government was established in 1900, the Territory set up a receiving and care station in Kalihi Valley, Honolulu, for those who were initially afflicted with the disease, as well as for those from Kalaupapa who were transported to Honolulu for such needed medical and other services as were not found at Kalaupapa.

After World War II, in 1949, when some buildings built during the war to house Naval personnel were no longer needed by the Navy, an eleven-acre plot with a cluster of wooden buildings and barracks on it was acquired by the State from the federal government. The Kalihi station was abandoned and all leprosy patients using the same were transferred to a large two-story wooden barracks building on the plot, the "Clinton Building", which became known as Hale Mohalu ("House of Relaxation"). The facility was licensed as a "Skilled Nursing Facility", i.e., as a nursing home, not as a hospital.[1] In 1956, the plot was conveyed to the Territory. The deed provided that the then Territory of Hawaii should provide care thereon for leprosy sufferers for at least 21 years thereafter.[2]

At that time there were over a hundred leprosy patients living in the Hale Mohalu facility. There, nursing and general custodial care for leprosy patients were provided. The facility was also used to house those from Kalaupapa who were in

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[1] Affidavit of Malcolm T. Tomooka, Exhibit C—Defendant's Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment (D.'s M.O.).

[2] The state used some of the other buildings on the lot for other social and welfare clinics and offices.

Honolulu for any reason. Those who were permanently residing at Hale Mohalu were known as "registered Hale Mohalu patients". Those whose permanent homes were in Kalaupapa were "registered Kalaupapa patients".

As indicated above, the new drugs brought about a complete change in the method of treating and caring for those suffering from Hasen's disease. There was no longer any need to keep those suffering from leprosy in isolation. As a result, most of those registered patients of Hale Mohalu were gradually released to return to their siblings and to the community, and the number of "registered Hale Mohalu patients" steadily declined.

In the 1960's, it was recognized by those concerned with the problems of Hansen's disease and its sufferers that the Clinton Building, from the very nature of its design and construction, was not, and would not be, the best place for the type of care and support required for the "old-time" Hansen's disease sufferers. Apparently stimulated by A. A. Smyser, Editor of The Honolulu Star Bulletin, the State Department of Health appointed a Citizen's Committee on Leprosy in 1968 to make a study of the problem of leprosy in Hawaii.[3] Dr. Thomas K. Hitch, Ph.D. in Economics, was Chairman. On the Committee were six medical doctors, among whom was Robert W. Worth, who testified before this court in the present hearing. Also on it was Bernard Punikaia, a "registered Kalaupapa patient", and one of the plaintiffs in this action, who also testified at this hearing. Another leprosy patient, Mrs. Anita Una, was on the Committee. The remainder of the 15-member Committee was composed of individuals from diverse ethnic and occupational

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[3] In Brede v. Director for the Department of Health, etc., 616 F.2d 407 (9th Cir. 1980), that court assumed that when, on March 23, 1977 "Hawaii's title to Hale Mohalu became a fee simple absolute", "shortly thereafter the State began proceedings to close the facility and moved its residential and medical support services to Leahi Hospital in Honolulu." *Brede, supra*, at p 410. This assumption was incorrect.

groups in the community. In its report, "A New Look At Leprosy In Hawaii",[4] the Committee reviewed the history of leprosy throughout the world as well as in Hawaii, and the incidence of the various types of leprosy in Hawaii. The report also pointed out the changes which had resulted from the development of sulfone drugs which, by 1946, made leprosy curable. The Committee heard "extensive testimony from numerous leprologists and deliberated for a period of five months before making its recommendations."[5] Among the Committee's recommendations was that "facilities for comprehensive treatment of leprosy should be established in close proximity to the University of Hawaii Medical School". At that time, the Medical School was located on the grounds of Leahi Hospital, a hospital complex[6] that had been built by the Territory for tubercular patients before a cure for that disease had been found.

Dr. Robert Worth, as well as Bernard Punikaia and Anita Una, joined in the unanimous adoption of the report.

The Department of Health was unable to relocate the leprosy program at that time because the University of Hawaii, which was running the Medical School, could not allocate space in the Leahi Hospital complex for the leprosy program.

The Clinton Building had steadily deteriorated. It has never been intended to be a permanent building. It was a war-time building, and the wood had not been given anti-termite and rot treatment. It had rolled asphalt paper type of roofing. It had been designed for use as a nursing facility. The building had 42

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[4] Defendant's Exhibit #15.

[5] *Ibid.*

[6] The hospital buildings were of concrete construction.

[7] There were many other recommendations, including methods for the handling of newly discovered cases of leprosy, provisions for those living in Kalaupapa, and the necessity for educating the public on the problems of leprosy in the community.

"barracks rooms" (12' x 16' or larger) on each floor, with 9 general service rooms (washrooms, toilets, storage, kitchen, etc.) on the first floor, and 6 similar rooms on the second floor, with a large lobby in the middle of the two wings. Some of the barracks rooms had only wash basins, some had only toilets, a few had neither. There were many with both, but there was full wash, shower, and toilet facilities available in other rooms in each wing on each floor.

Because the building did not meet the requirements of Building and Life Safety Codes necessary to comply with the standards for licensure, the Department of Health attempted to obtain legislative appropriations for renovation and alterations of the Clinton Building. In May of 1971, the Citizen's Committee on Leprosy was reconvened to discuss the legislative appropriations made in 1965, 1967, and 1968 for reconstruction of the Hale Mohalu facility at Pearl City. That *same* Citizen's Committee voted *against* utilization of the appropriated funds for the rebuilding of the Clinton Building.

During these years, there was a steadily decreasing leprosy patient census, with a concommitant steadily decreased use of the Hale Mohalu facility. The Depatment of Health considered the possible use of other state-owned hospitals for leprosy patients. The Citizen's Committee rejected such proposals but felt that removal of the Honolulu leprosy program to the Trotter Building at Leahi Hospital would be satisfactory. Unfortunately, in 1974, the Leahi Hospital was still under the administration of the University of Hawaii, and space was then not available for the leprosy program in any of the hospital buildings.

In early 1974, Acting Governor Ariyoshi initiated what became known as the Gooch-Harrington Study, a joint staff study by Dr. Gooch of the State Department of Health, and Dr. Harrington of the State Department of Budget and Finance. In February 1975, its 149-page report, "The Leprosy In-Patient

Program in Hawaii" was published.[8] As indicated in the "Acknowledgements", "the cooperation of Kalaupapa eligibles and Hale Mohalu eligibles during the attitudinal survey was very important during the study". The report concluded that the steadily decreasing patient census made it impractical to continue the operation of the Hale Mohalu facility as a separate in-patient treatment facility for leprosy patients. The new drugs and treatments had rendered leprosy non-communicable only after a relatively short period of treatment. Thus, almost all new patients could be treated under an out-patient program. The in-patient patients at Hale Mohalu and Kalaupapa, therefore, would be steadily depleted as the "old-timers" died.

The study concluded that the continued operation of Hale Mohalu was economically unsound, and recommended that the patients at Hale Mohalu should either be returned to Kalaupapa or placed in appropriate private facilities at state expense, or returned to the community with state support. A major recommendation was that the Hale Mohalu facility be closed as of June 30, 1974. At that time (February, 1975), there were only *6* permanent residents at Hale Mohalu, some of whom needed skilled nursing services, and an average of 15 Kalaupapa residents using the facility when they were in Honolulu for medical and other reasons. The 6 permanent residents were all "old-timers", since, by then, no new leprosy patients were being admitted for in-patient care.[9]

In recognition of the fact that the Kalaupapa residents were the remnants of those who were afflicted with the disease for many years before effective medications became available, and many of those had residual defects from nerve damage and other crippling aspects of leprosy, during its 1976 session the State Legislature, by Senate Concurrent Resolution #93, established a state policy to permit any Kalaupapa patient desiring to remain there at the Settlement to do so for as long as he

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[8] Defendant's Exhibit #16.

[9] Plaintiffs' Exhibit #36.

might choose, regardless of whether or not he had been successfully treated. Provision was also made for adequate health care and other services for the lifetime of those patients.[10]

The 1976 State Legislature also turned over the administration of the Leahi Hospital grounds to the Department of Health effective as of July 1 1976.[11]

After that, on February 2, 1977, Dr. Leslie Koch, Chief, Leprosy Control Program, and Richard Young, Administrative Office, Communicable Disease Division, held meetings, separately, with the patients and staff of Hale Mohalu on the Department's plan to terminate the Hale Mohalu operations at Pearl City and, thereafter, establish a revised operation at Lehi Hospital. The record of that meeting reflects that at least 7 patients were present, five of whom were Hale Mohalu chronic-care patients. At that time, the patients were advised that the move "which we have been talking about for the past two years" would occur within the next six months. It was Young's conclusion that the patients seemed to realize that the move was inevitable, and that their main concerns were that they would be provided comfortable quarters. They were then told that it would not be possible to have individual rooms for everyone, but that the Department would try to provide individual rooms for "the five chronic-care patients" then at Hale Mohalu. The transients from Kalaupapa for short-term care were told they would be placed in ward beds. One of the Kalaupapa registrants at the meeting indicated that he wanted a separate room for himself and his wife. One of the Hale Mohalu registrants said that he had to have a telephone and was willing to pay for it himself. Another was concerned about

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[10] *Ibid.*

[11] At that time, the leprosy program could not be moved into the Trotter Building because it was then being rented to a private nursing home while that home was building its own new facility elsewhere. On March 5, 1977, that lease ended.

her employment so that she could become eligible for a pension. She was assured that work would be given her to be able to qualify her for pension requirements. The main concerns expressed by the patients were for privacy, comfortable quarters, adequate storage space for their personal belongings, and access to a telephone.

The patients were then advised of four alternatives: (1) they could move with the program to Leahi; (2) they could request a transfer to Kalaupapa; (3) they could request discharge and return to the community; and (4) if they preferred to transfer to a private nursing or care home, the Department would explore that possibility and its cost.[12]

On May 4, 1977, the Department held a public information meeting on the relocation of the Hale Mohalu program to Leahi Hospital at 7:0[illegible] p.m. at the Sinclair Auditorium at Leahi Hospital. For that meeting, the Board of Health had sent notices of the Meeting to almost 150 business and professional men and women of the Kaimuki community, along with state legislators and news media persons. Also present were leprosy patients from Hale Mohalu and Kalaupapa. The panel members were Dr. Koch, Richard Young, Dr. Verne Waite, Chief of the Hospital Medical Facilities Branch, and Abe Choy, Administrator of the Leahi Hospital. Dr. Waite stated that Hale Mohalu was dangerous and unsafe and failed to meet the Life Safety Code, and indicated that he was reluctant to continue issuing a license for the Hale Mohalu program to operate in the Clinton Building. The Board of Health stated that the cost to replace the Hale Mohalu building to be around $2 million, but that cost alone was not the basis for the projected move. It was the belief of the Board of Health that the leprosy patients would be getting better medical and nursing care and facilities. The whole spectrum of the history of leprosy and the progress of its treatment were presented for the education of those from the community.

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[12] Defendant's Exhibit #1.

A Kalaupapa patient expressed concern over whether Kalaupapa patients would be given separate rooms. Another inquired about bathroom facilities. Another was concerned over private rooms. At that time, there were only 5 Hale Mohalu registered patients, and Mr. Young advised them that it was planned to accommodate each of them with single rooms. He also indicated that Kalaupapa patients would probably not be given single rooms, but, rather, ward rooms. Provisions would be made for married patients to have private rooms. All of the questions from the patients about the facilities they would have in the Trotter Building were answered. Not one unfavorable comment was registered. It was obvious, however, that the patients had "reservations about this move and [were] not looking forward to it".[13]

In September 1977, the Department of Health applied to the State Health Planning and Development Agency (SHPDA) for a Certificate of Need to renovate the south wing of the Trotter Building at Leahi Hospital for the Hale Mohalu leprosy program. A public meeting was held on November 8, 1977, at the Mabel Smythe Auditorium at Queen's Hospital in Honolulu. In attendance was James L. Swensen, Administrator of SHPDA. This agency controls the issuance of Certificates of Need for the location and use of any health care facility. Also present were representatives of the Department of Health, six leprosy patients, and members of the public. Written and oral arguments were presented for and against the proposed closing of the facility at Pearl City. Three of the leprosy patients, including Bernard Punikaia, had their round-trip air transportation between Kalaupapa and Honolulu paid by SHPDA. Punikaia, as Chairman of the Patients Advisory Council, read aloud and filed a 4-page typewritten letter addressed to Swensen opposing the closing of the Hale Mohalu program at Pearl City.

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[13] Minutes of the Board of Health meeting, May 20, 1977; Defendant's Answers to Plaintiffs' First Interrogatory Question #12.

Another public meeting was held on November 17, 1977. Again, Swensen and other SHPDA staff attended, as did George Yuen, the Director of the Health Department and other Department of Health staff. Bernard Punikaia was again present. Also in attendance was State Representative Neil Abercrombie with members of the public. Again, written and oral arguments were presented for and against the closing of the Hale Mohalu facility. Representative Abercrombie spoke against the closing and presented a 2-page letter. Yuen explained the reasons why the Department of Health sought the closing of the facility. The speakers were then questioned by others in attendance.

Another meeting was held on November 29, 1977, at the Clinton Building. George Yuen of the Department of Health and other Department of Health staff and SHPDA staff were there, along with Bernard Punikaia, acting as "Chairman of the Patients Advisory Council". State Representative Neil Abercrombie, as well as the leprosy patients then residing at Hale Mohalu, were also present. The leprosy patients questioned Yuen about the reasons for the proposed closing of the Hale Mohalu facility. Abercrombie and Punikaia presented arguments in opposition to its closing.

On December 1, 1977, the Hawaii Statewide Health Coordinating Council (HSHCC) held a meeting at the boardroom of the Department of Health in Honolulu with 20 committee members present and 14 guests, including Bernard Punikaia and Abercrombie. Also present was Susan L. Arnett, a Legal Aid attorney acting as counsel for Punikaia. (The Council could only make recommendations to the DHEW. Its actions were not final.) One of the items on the agenda was the application by the Department of Health for an Emergency Certificate of Need to relocate the Hale Mohalu leprosy program. At that meeting, Ueoka, Chief of the Administrative Services Office of the Department of Health, advised the Council that on November 15 the licensing division of the Department of Health had stated that the license for Hale Mohalu at Pearl City would not be renewed after December 31,

1977, and, therefore, a Certificate of Need was necessary to close that facility. He then again outlined the problems, possible solutions, and alternatives in providing quarters for the leprosy patients at Hale Mohalu, e.g., moving them to Waimano Home (state hospital for mentally retarded), Hawaii State Hospital (for the insane), Maluhia Hospital (state hospital for the aged), returning the patients to Kalaupapa, housing the patients in hotels, or renovating "the Administration Building" (another old Naval wooden building on the 11-acre site). None of the above was physically or financially feasible. Ueoka reported that the Clinton Building did not meet fire and safety codes. The Board of Health's request for the Emergency Certificate of Need received 12 votes for, 4 against, and 2 abstentions. (Two members had left the meeting before the vote.)

On December 16, 1977, another SHPDA meeting was held at the Hawaii Medical Library in Honolulu. Also attending were Department of Health representatives, 2 persons from the Honolulu Fire Department, State Representative Abercrombie, Bernard Punikaia, and his attorney, Susan Arnett. Again, oral arguments were presented for and against the issuance of a Certificate of Need for the closing of Hale Mohalu and the transfer of the program to Leahi.

On January 5, 1978, the HSHCC again met at the boardroom of the Department of Health, with 20 members present and 10 guests. The Hale Mohalu problem was again reviewed. It was reported that on December 20, the SHPDA met with the Department of Health and the Honolulu Fire Department, at which time the Fire Department stated it had expected the Department of Health to comply with all of the 9 violations the Fire Department had cited within 30-90 days, and the Department of Health reported that 2 of the structural violations would need materials costing $30-$40,000 that would only serve to keep the Clinton Building open for 6-8 months. On December 23, the Final Notice of Violation had been sent to the Director of the Board of Health by the Honolulu Fire Department. Since the Final Notice was incorrect, on December 28 a Corrected Final Notice of Violation had been received by the

Board of Health. On December 30, the Director of the Board of Health had requested that the Deputy Chief Fire Marshal extend the time for the Department of Health either to comply with the violations or move the patients. On January 3, 1978, the State Fire Marshal had granted the Department of Health an extension up to January 23 in which to correct the 9 violations, or move the patients and vacate the Clinton Building. Therefore, the SHPDA issued an approval for a Certificate of Need to allow the patients to be relocated in the Trotter Building.

January 8, 1969, the 11-member Hansen's Disease Committee of the Comprehensive Health Planning Advisory Council (CHPAC) met in Honolulu with Punikaia and another patient, Una, present, along with Dr. Robert Worth (who testified in the instant hearing). At that meeting, the problem of moving the leprosy program out of the Clinton Building to Leahi was discussed. The state's Answers to Plaintiffs' First Interrogatories #12, 13, 14, 15, and 16 show that between that time and January 26, 1978, at least 23 hearings on the subject were held before some health committee, council, or agency; 3 in 1969; 6 in 1971; 1 in 1972; 1 in 1973; 1 in 1974; 1 in 1975; 1 in 1976; 8 in 1977; and 1 in 1978. Some were held at Kalaupapa, some were held at the Clinton Building, and one was held at Leahi. At many of the meetings, Punikaia or other patients were present.

The attitude of those apprehensive of the proposed move is indicated in the Minutes of the November 17, 1977 meeting of HSHCC, where Representative Neil Abercrombie spoke on behalf of the patients of Hale Mohalu. He referred to the Trotter Building as "like being in prison". Punikaia, in his statement at that meeting, indicated that he and four patients of Hale Mohalu had visited the Trotter Building, and stated "they could never accept the south wing [Trotter Building] because it would be like a prison." "The Department of Health is again forcing the patients into isolation."

As indicated, the decision to move the program from the Clinton Building to the Trotter Building was not a hasty one..

It was not an arbitrary decision on the part of the Department of Health. It was done only after a multitude of open public hearings with patients and patients' representatives, and an attorney for those patients.

That the Clinton Building had become unsafe for the purpose intended was obvious even before the Fire Department sent out its notices of violation in December 1977. It had been built as temporary quarters for the young and agile men and women of the Navy and was intended, because of necessity, for emergency war-time use. Its framework did not pretend to comply with the code requirements for buildings to be used as nursing homes for the elderly and sick. Only those who have lived with the problem can appreciate the effect of ground-nesting termites on untreated mainland soft woods. The largest beams can have all, except the annular rings, completely eaten away before the presence of such termites may be discovered. Dry-wood termites steadily take their toll, only usually more obviously. The humidity in Hawaii in such that both wet and dry rot attack the ordinary pine, fir, spruce, and cedar, western-type building materials. The Clinton Building had steadily and dangerously suffered from all such attacks.

By December 15, 1977, there is a report from James R. Early of Martin, Early Consulting Structural Engineers.[14] On the condition of the Clinton Building, he noted, "The building has been fire sprinkled for *some* protection against fire." [Emphasis added.] He observed termites in "those spaces that were opened and could be readily seen". He reported "some major problems [with termites] in the lobby area, where *temporary shoring* has been placed to support the second floor joists that frame into the seriously damaged floor beams and columns". [Emphasis added.] He goes on to say that those temporary shores might be adequate to support the static loads "satisfactorily, with the possible exception of the posts that are supporting the roof and resting on the termite-eaten posts at

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[14] Plaintiffs' Exhibit #1.

the ground floor level". He continues, "To say that this building is structurally safe would be foolhearty [sic], particularly on a long-time basis. However, for a short term it would be reasonably safe."[15]

The report of Alfred Yee and Associates Engineering, Etc., of December 8, 1977,[16] found the major girders and columns supporting the second floor framing were wood members 12'' x 16'', 6'' x 12'', and 4'' x 12''. The firm's structural engineer, Chang Nai Kim, "estimated that termite infection had destroyed approximately 30% of the cross-section area of the main girder". One of the "two supporting columns of this major girder . . . has lost approximately 33% of its effective cross-sectional area, while the other column has been reduced by approximately 25% . . . due to termite infestation . . . [of] untreated douglas fir lumber". It was his opinion that "termite damage is occurring in the second floor framing and probably throughout the whole building structure". He concluded that the "structure [of the Clinton Hall facility] is in a serious state of deterioration. Every member is suspect of its degree of structural effectiveness . . . major members have been destroyed by over 50% of its cross-section properties". "It is my opinion that many areas may not be able to support gravity . . . and dead and live loads . . . In the event that the Honolulu Building Code and wind and earthquake loads occur, there is significant probability that major damage in the structure would occur. In view of these considerations, it is further my

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[15] On January 18, 1982, as shown by Plaintiffs' Exhibit #5, an inspection by a termite extermination firm found active dry-wood termite infestation in door frames, door jambs, window frames, window jambs, walls, and cabinets, and subterranean (ground termites) in various areas of 2'' x 10'' floor joists over at least 6 rooms, and infestation in the structural members of the lobby (recreation room) column posts. "It was also noted that wood rot . . . was present throughout the structure, and that the ground termite problem will persist as will the problem of wood rot."

[16] Defendant's Exhibit #3.

recommendation that the Clinton Hall facility is not safe for occupancy . . . this building should be vacated."

As indicated heretofore, in the first part of December 1977, the Fire Prevention Bureau of the Honolulu Fire Department sent to the state a Notice of Violation. The matter was referred to a non-state architect, Douglas K. Sonoda, A.I.A., who reported that he had conducted a site investigation of the Clinton Building, and concluded, "The first 8 of the 9 violations cited can be corrected to meet the present regulations or requirements." The last violation, which required that the building meet the minimum construction standard as stated by the National Fire Protective Association, "is considered to be unfeasible . . . To meet NFPA's requirement of a two-hour fire-resistant construction will necessitate the reconstruction of the entire building." This was because, due to the fire retardancy of wood members, the stud spacing and sizings would have to be changed. He concluded, "To reconstruct the building to meet present regulations will incur a major cost to the State of Hawaii."

On December 28, 1977, the Department of Health received from the Office of the Fire Chief, Honolulu Fire Department, "Final Notice",[17] whereby the state was ordered to provide (a) 40-inch clear width doors for all patients' rooms in the Clinton Building; (b) 1-3/4'' solid wood bonded core doors for all patients' rooms with self door closures and magnetic hold-open devices interconnected to fire alarm and smoke detectors; (c) exit signs with continuous illumination from emergency power source; (d) one-hour separation between corridor, sleeping rooms, and treatment areas, and wire glass for openings limited to 1,296 square inches; (e) separation above doors from wall to wall and floor to floor; (f) Class A or Class B interior finish; (g) electrical interconnect sprinkler system to fire alarm system; and (h) to meet minimum construction standard

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[17] Defendant's Exhibit #5.

NFPA 220.[18] The Fire Department gave the Board of Health 5 days to comply with its orders.

Of course, it was impossible for the Department of Health to make the changes necessary for compliance within 5, or even 50, days. As indicated above, the Department of Health had already decided on moving the Hale Mohalu program to Leahi. The Department, therefore, on December 30, 1977, requested that the Fire Department extend the period of compliance to January 23, 1978, stating "This time extension will permit us to (1) secure a Certificate of Need, and (2) move the residents to . . . the Trotter Building, Leahi Hospital".[19] On January 3, 1978, the Fire Marshal granted the requested extension under the proviso that during the interim, the Board of Health should implement temporary life safety measures against the hazards of fire and panic, viz., assign an additional hospital attendant to duty at night, quarter the patients in close proximity to each other, seal off the second floor from entry and cut all electricity thereon, and provide two smoke detectors on the first floor.[20]

The Hospital and Medical Facilities Branch of the Department of Health "urged" that the leprosy patients be moved from Hale Mohalu to a safe building. Because it was impossible to transfer those in the Clinton Building to Leahi immediately, a temporary licensure at Hale Mohalu for a period of three weeks was secured in order to give time for the transfer.[21]

On January 12, the Department of Health sent and delivered letters to the residents at the Hale Mohalu Hospital and Kalaupapa Settlement advising that they would be moving into the Trotter Building of Leahi Hospital about January 23, 1978. The letter recognized that some of those in the Clinton Build-

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[18] This last refers to the NFPA requirements stated in Sonoda's report, *supra*.

[19] Defendant's Exhibit #6.

[20] Defendant's Exhibit #7.

[21] Defendant's Exhibit #9.

ing were reluctant to move, but stated that all efforts were being made to provide for their needs in a "safe, comfortable, and friendly setting". The letter stated that the serious structural deficiencies of the Clinton Building made it unsafe for continued occupancy, and that any attempt at repair would take at least a year, and, even if repaired, it could not fully comply with the Life Safety Code because of its wood construction, that full compliance would demand building an entirely new structure on the site. On January 26, 1978, the transfer of patients took place.

On January 26, 1978, the total number of those afflicted with leprosy at the Clinton Building was 20. Only five of the 20 were "registered Hale Mohalu patients", i.e., those who had no desire to live at Kalaupapa and were either without desire to live out in the general community, or physically so handicapped that they had to have continuous skilled nursing facilities.

All other patients in the Clinton Building at that time were of Kalaupapa registry, i.e., they had homes, assigned to them for life, at Kalaupapa. They were in Honolulu either for medical services that they could not get at Kalaupapa, or for their own personal business and social reasons. In this group were plaintiffs Frank and Mary Duarte. Mary had come from Kalaupapa to Honolulu because she needed kidney dialysis, and her husband, Frank, accompanied her. Plaintiff Clarence Naia was in Honolulu because he was having trouble with his feet, which demanded medical attention. Plaintiff Bernard Punikaia had come from Kalaupapa for the specific purpose of opposing the transfer of any patients to Leahi.

No attempt was made by the state to physically force anyone to move to Leahi. The state still continued to supply electricity and water and food to those who insisted on staying in the old Clinton Building. This condition existed until the latter part of August, 1978, when the state notified those still living in the termite-ridden and structurally unsafe building that it was going to shut off all water and electricity to the building, and

end the food supply on September 1, 1978. When those still there did not leave, on that day the state physically shut off all the water and cut off all electricity and telephone service to the building, as well as ceased to furnish food to the occupants. The state felt it could no longer, even inferentially, be held responsible for the safety of those who continued to occupy the unsafe structure. It was because of this act on the part of the state that the present suit was brought.

It is to be noted that each and every one of the plaintiffs in the first Complaint filed September 5, 1978, were registered residents of Kalaupapa. The plaintiffs did *not* include *any* of the leprosy patients who had been transferred to Leahi in the preceding January. Each and every plaintiff had his or her own home in Kalaupapa. Each and every plaintiff was but a transient visitor at Hale Mohalu, using the same as a state-furnished place of temporary residence while in Honolulu. Each was free, at all times, to return to Kalaupapa or to leave Hale Mohalu and live in the public community.

It would appear from the opinion of the appellate court in *Brede* vs. *Director for the Department of Health, etc.*, 616 F.2d 407 (1980) that the appellate court was never apprised of these facts. That opinion, apparently, was based upon the following factual assumptions:

> Shortly [after March 23, 1977 when "Hawaii's title to Hale Mohalu became a fee simple absolute"] the state began proceedings to close the facility and move its residential and medical support services to Leahi Hospital in Honolulu.
>
> A number of the facility's residents, in apprecitation of the residential nature of Hale Mohalu with its private or semi-private living quarters and easy access of friends and families, chose to remain. Over the last decade, advances in medical science have enabled physicians to treat leprosy patients through outpatient services. As a result, the inpatient residents remaining at Hale Mohalu were among

> the more elderly, afflicted, and crippled of the leprosy population.[22]

While it is true that Mary Duarte, one of the leprosy patients who remained behind, was elderly and crippled, both she and her husband, Frank, were residents of Kalaupapa and were in Honolulu solely because Kalaupapa did not offer the kidney dialysis treatment that she required. Even she was in no sense a "permanent resident" of Hale Mohalu. Her house and home were in Kalaupapa. She was in Hale Mohalu only as a transient visitor. All the others who remained behind were but transient visitors from Kalaupapa.

As will appear more specifically hereafter, the facility at Leahi has been, and now is, prepared to give to the Kalaupapa transients the same medical and physical care that were supplied them at Hale Mohalu. It, of course, could not permit the transients to have three dogs in the lobby and a horse in the front yard, as is now the situation at the Clinton Building, nor does it permit transients to have the absolute and unrestrained freedom of having visitors, parties, and celebrations at any time they may desire, as now enjoyed by those still using the Clinton Building.

The new Leahi facility has almost precisely the same rules and regulations which were in full force and effect at the Clinton Building prior to January 26, 1978.

The *Brede* court considered the issues of entitlement. The record now makes certain that the Hale Mohalu facility never purported to be a Medicaid intermediate care facility within the meaning of 42 C.F.R. 499.10(b)(15) (1977). Thus, it was not a facility to which those patient transfer regulations applied. The patients at Hale Mohalu were *not* entitled "to a fact-finding hearing as to the cause of their transfer".[23]

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[22] P. 410.

[23] P. 411.

THE BREDE COMPLAINT AND APPELLATE OPINION:

As this judge read the appellate opinion in *Brede*, it seemed that the *Brede* court had comingled the January 26, 1978 transfer with the September 1, 1978 cut-off of facilities for those Kalaupapa transients still using the Clinton Building.

As the September 5, 1978 Complaint states, the plaintiffs "are protesting the September 1, 1978 order by the Department which cut off the electric power, water, telephone, food service and medical services previously being supplied to Hale Mohalu".[24]

Plaintiffs therein acknowledged that they were "leprosy patients of Kalaupapa who are presently staying at . . . Hale Mohalu".

Plaintiffs' basic prayer was for "(4) an immediate order [that] 'the Department both temporarily and permanently . . . return water, power, food service, telephone and medical services to Hale Mohalu'; (5) an order allowing 'the patients/ Plaintiffs the right to permanent use of the Hale Mohalu facility'."[25]

The *Brede* court recognized that under the Hawaii state law, the Hawaii Health Department has the unrestricted power to prescribe the place of treatment of leprosy patients, and the statutes appear to authorize patient transfers at will.[26] The only services to which the plaintiffs, all Kalaupapa transients, were entitled were to have free transportation to and from Kalaupapa to any facility which could supply them with such temporary medical attention and nursing care as might be required to assist them to keep in good health during such time as they might be in Honolulu. On September 1, 1978, the state did "not act so as to reduce those services to the point of

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[24] Brede Complaint, p. 1.

[25] *Ibid*, p. 5.

[26] P. 411.

imperiling life or imposing other severe hardships" upon any of the Kalaupapa transients still in the Clinton Building. As is shown by all of the pictures of the facilities available at Leahi[27] and the testimony regarding the same, when compared to the leaky, termite-riddled structurally unsafe Clinton Building, the Leahi facility then gave and still gives far, far better care to all leprosy patients then or now using the Clinton Building for their Honolulu headquarters while away from Kalaupapa.

All the Leahi facilities had been available to those persisting on staying in the Clinton Building during the seven months after the Hale Mohalu program had been transferred to Leahi. Some of the plaintiffs had used its medical facilities during that period.

Thus, the state did not reduce any of the services it was obligated to supply to those suffering from leprosy when it closed out the program at the Clinton Building in January. It did not impose any hardship at all upon the Kalaupapa transients other than (1) the dangers of being transported approximately 12 miles through city traffic from one facility to the other; (2) living in different sized, but structurally safer, rooms; and (3) making them readjust to new shops and restaurants. Transportation was and is supplied by the state to the leprosy patients for shopping and other necessary services.

Moreover, the *Brede* plaintiffs had never been "transferred". Most had never moved out—some had *moved in* after January 26. They were all free to return to their Kalaupapa homes or out into the general community. The state was prepared to give them all necessary medical services—but not necessarily at the Clinton Building. It was prepared to give them power and water and food and shelter, as well as medical services at Leahi—if the plaintiffs *chose* to go there. The state has never forcibly attempted to transfer these plaintiffs to Leahi, nor has it forcibly transferred them out of the Clinton

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[27] Defendant's Exhibit #27.

Building. All that the state actually did on September 1, 1978 was, in effect, to say to the plaintiffs that the state would no longer assist them in any way in remaining in that unsafe building.

Nevertheless, the *Brede* court, *sua sponte*, suggested to the plaintiffs the *possibility* that they *might* have suffered a reduction in the services supplied them by the state "to the point of imperiling life or imposing other severe hardship"[28] because "transfer trauma is a possible result of the state's decision to relocate the Hale Mohalu patients."[29]

It appears to this judge that the "transfer trauma phenomenon", even if it had any legal basis for being transformed into a "due process deprivation", could not have applied to the plaintiffs—all of whom were from Kalaupapa. The Clinton Building was never their "home". For them, it was only the "motel", with some medical services available, supplied by the state for them when they were in and out of Honolulu on the way from and to their homes in Kalaupapa.

It would appear, however, that the phenomenon of transfer trauma which concerned the Court of Appeals no longer may validly be construed as constituting a "deprivation cognizable under the due process clause". The acceptance by the trial judges in *Bracco* v. *Lackner*, 462 F.Supp. 436 (N.D. Cal. 1978), *Klein* v. *Mathews*, 430 F.Supp. 1005 (D.N.J. 1977), and *Burchette* v. *Dumpson*, 387 F.Supp. 812 (E.D.N.Y. 1974) upon which the Circuit Court based its conclusion that the "phenomenon known as 'transfer trauma' "[30] was a judicial and scientifically accepted medical fact is no longer legally valid. In *Helen B. O'Bannon* v. *The Town Court Nursing Center*, 447

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[28] *Brede*, p. 412.

[29] *Ibid.*

[30] *Brede*, p. 412.

U.S. 773 (1980), Justice Blackmun, in his concurring opinion, stated that

> "The fact of the matter, however, is that the patients cannot establish that transfer trauma is so substantial a danger as to justify the conclusion that transfers deprive them of life or liberty. Substantial evidence suggests that 'transfer trauma' does not exist, and many informed researchers have concluded at least that this danger is unproved.[12] Recognition of a constitutional right plainly cannot rest on such an inconclusive body of research and opinion."[31]

As indicated above, none of the plaintiffs have, nor could they show, any "transfer trauma" because they were not, and could not claim to be, forcibly transferred from any "home". Even without reaching that conclusion, however, this court feels that Justice Blackmun's opinion disposes of any possible constitutional claim of deprivation by these plaintiffs based upon allegations of "transfer trauma".

The court, in *Brede*, assuming that a possible entitlement to a due process hearing might exist, remanded the case to the district court to "hold hearings designed to ascertain whether the plaintiffs have an entitlement to services at Hale Mohalu arising out of either the Medicaid regulations or from the possibility that transfer of Hale Mohalu services to Leahi Hospital could impose a severe hardship on the plaintiffs. If such an entitlement exists, then the adequacy of the hearings already held must be ascertained and any hearings necessary to afford appellants due process should be held."[32]

THE PUNIKAIA COMPLAINT:

Following remand, plaintiffs, on May 10, 1980, filed an Amended Complaint in order to incorporate a claim of "intentional infliction of emotional distress" based upon the circuit

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[31] *O'Bannon*, p. 804.

[32] *Brede*, p. 412.

court's transfer trauma theory of possible entitlement. In that Complaint, both the order of precedence and some of the parties had been changed. Bernard Punikaia became the lead plaintiff; Clarence Naia was moved into position behind the Duartes. Leon Nono, Jubilee Pudhala, and Antonion Sagadraca and Shivuku Sagadraca were dropped. Sam Kaliko was added.[33] As stated previously, none of these plaintiffs ever intended to use the Hale Mohalu facility as anything but a housing, resting and care facility whenever they were in Honolulu. Their homes had been, and still are, in Kalaupapa.

Bernard Punikaia's name, properly, should head the list of plaintiffs. Although his face, hands, and feet show the ravages of the disease which had afflicted him from the age of 6, he, today, at age 53, is clearly the most intelligent of all of the plaintiffs who testified in court. He speaks well and fluently. He is fully ambulatory, drives his own car, and has been the representative of the Kalaupapa patients on all of the problems of the leprosy program from 1969, when he, as a member of the Citizen's Committee on Leprosy, *supra*, appoved the proposed shift of the Hale Mohalu program from the Clinton Building to Leahi. When, in the late 1970's, it became apparent that a move was going to be made, he turned to a position actively and vocally opposing any move out of the Pearl City facility. As noted above, he appeared at every one of the public meetings held on the subject, twice accompanied by counsel. After the HSHCC, on January 5, 1978, had granted the Board of Health an approval for a Certificate of Need to transfer the Hale Mohalu patients to the Trotter Building at Leahi, it was Punikaia who, on January 20, 1978, filed the Complaint in the Hawaii state courts seeking to enjoin the planned transfer.[34]

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[33] The plaintiffs also stated that this action was brought "individually and on behalf of all others similarly situated". No action was taken either by the plaintiffs, the defendant, the district magistrate, or the district judge to determine whether this should become a class action, nor was this problem ever presented to the Appellate Court after appeal from Judge King's rulings on the case.

[34] This is more fully discussed, *infra*.

When all of those residing in the Clinton Building were notified that the move would take place on January 26, 1978, he was at his home in Kalaupapa. As Punikaia testified during the present hearings, he then came to Honolulu and moved into Hale Mohalu on that day for the purpose of protesting the move. Except for occasional trips back to his home in Kalaupapa, he has remained in the Clinton Building ever since and expects to remain there until this case is settled. He is clearly the most outspoken and aggressive champion of the position taken by the plaintiffs, viz., that they do not propose to leave the Clinton Building or use the Leahi facility.

On May 19, 1980, the plaintiffs again filed a Motion for a Temporary Restraining Order that would mandate the state to restore all electrical power, water, food, telephone, and 24-hour nursing services to the Clinton Building. On May 20, 1980, U.S. Magistrate Thomas Young heard the plaintiffs' Motion, and on June 11, 1980, in his report and recommendation to the district judge, recommended denial of the plaintiffs' Motion. The plaintiffs filed objections to the magistrate's report, and on June 28, 1980, U.S. District Judge King affirmed that report. Thereupon, the plaintiffs filed an appeal to the Ninth Circuit following which, on November 27, 1981, the Ninth Circuit remanded this second appeal back to this court for an evidentiary hearing. On January 25, 1981, this judge began the hearing mandated by the Circuit Court. This took five trial days.

THE PUNIKAIA OPINION:

In the November 28, 1981 Order of the Circuit Court, the *Punikaia* panel stated that the opinion of the *Brede* panel "indicated that the plaintiffs' claims do have some merit, and we expressly reject the magistrate's conclusion to the contrary". The first part of the above conclusion of the second panel was *incorrect*. Nowhere in its opinion did the *Brede* court conclude either legally or factually that the plaintiffs' claims actually had any merit. To the contrary, it threw out most of the plaintiffs' claims as having no merit whatsoever. All that

the *Brede* court found was that the plaintiffs' claims might *possibly* have some merit. Although the *Brede* court discussed the matter of plaintiffs' possible entitlement to continued operation of the Clinton Building *if* it were determined that Hale Mohalu qualified as a Medicaid intermediate care facility, or *if* the patients had an entitlement under Hawaii statutory law, or *if* the relocation would bring about the phenomenon of transfer trauma, it did no more than express the *possibility* that the plaintiffs might be entitled to a hearing before any transfer was made. Because the *Brede* court, on the record before it, felt unable to determine what the actual facts surrounding the Hale Mohalu problem were, it remanded the case to the district court to

> "ascertain whether the plaintiffs have an entitlement to services at Hale Mohalu arising from either the Medicaid regulations or from the possibility that transfer of Hale Mohalu services to Leahi Hospital could impose a severe hardship on the plaintiffs. If such an entitlement exists, then the adequacy of the hearing already held must be ascertained, and any hearings necessary to afford appellants due process should be held."

From the above, it is manifest that the *Brede* court did not reach any conclusion upon the merits of plaintiffs' claims. Nevertheless, because the district court judge did not specifically and in detail adopt the findings and conclusions of the magistrate, even though the order of the district judge agreed with the magistrate's recommendation that relief be denied, the *Punikaia* court ordered that the district court should hold an evidentiary hearing to consider, "under the present circumstances", the eight specific questions hereafter set forth "among others" this district court "may consider important".

1. "a. Which of the named plaintiffs are now living at Hale Mohalu? Are they full-time or part-time residents? Were all of those persons who are now at Hale Mohalu there at the time the State closed the facility?"

It has been stipulated by the parties that of the 13 original plaintiffs, i.e., those who were in the Clinton Building on

September 1, 1978 when the state shut off water, electricity, and telephone connections to the building and ceased supplying free food, janitorial services, and any medical care at that building, *only three* are still and now living there on a *full-time* basis—Bernard Punikaia, Clarence Naia, and Frank Duarte.[35] Each and every one of those three have houses (homes) in Kalaupapa and are registered as permanent Kalaupapa residents.

Frank Duarte, with his wife Mary, came from their Kalaupapa home in 1976 because Mary needed kidney dialysis, a treatment which she could not get at Kalaupapa. She was not given this treatment at Hale Mohalu, but rather at St. Francis Hospital in Honolulu. Her husband, Frank Duarte, came only because he wished to be with her. Mary Duarte is now dead. Frank Duarte testified during the hearing before this court that as soon as this case was over, he was returning to Kalaupapa.

Clarence Naia came from Kalaupapa to Hale Mohalu in 1977 for medical treatment. At the time of the trial, he was recovering from a recent operation on a foot and testified from a wheelchair. Before the hearing was concluded, however, he no longer needed the wheelchair and was able freely to move around with crutches. Clarence Naia testified that he, too, was going to leave the Clinton Building and return to his home in Kalaupapa just as soon as this case was over.

Bernard Punikaia testified that he has his home in and is registered as a voter from Kalaupapa, and in 1980 ran as a candidate for memership on the Office of Hawaiian Affairs for the Island of Molokai. He also testified that he had come to the Clinton Building from Kalaupapa in January 1978 solely to protest against and oppose the transfer of the leprosy program facilities from the Clinton Building to Leahi.

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[35] Stipulation, January 14, 1982.

All of those leprosy patients who were "Hale Mohalu registry patients", i.e., full-time residents of the Clinton Building prior to January 26, 1978, were, on that date, transferred to the Trotter Building of Leahi Hospital. As heretofore pointed out, the only leprosy patients who remained behind in the Clinton Building on that date were those who had houses (homes) in Kalaupapa and were in Honolulu only for medical attention or other personal reasons. Plaintiffs Paul Harada, Leon Nono, and Bernice Pupule, each and every one of whom are Kalaupapa registry patients with each having a house and home there, were not in the building on September 1, 1978, but came to Honolulu after that date and are now living in the Clinton Building—admittedly—on a *part-time* basis.[36] Not one of the above-named plaintiffs now living in the Clinton Building requires hospitalization. Some, on occasion, may require nursing or medical attention.[37]

2. "b. If basic services were restored at Hale Mohalu, would other members of the plaintiff class return to the facility? If so, how many would return?"

To give some response to this question, a survey was taken by plaintiff Paul Harada, with the assistance of Bernard Punikaia, of 109 out of he 125 patients in the residential program at Kalaupapa and Leahi Hospital, including, of course, the 3 plaintiffs Punikaia, Naia, and Duarte. Harada reported that out of the 109 patients contacted, 84 said they would "prefer" Hale Mohalu; 11 preferred Leahi, and 14 stated no preference. As the plaintiffs stated thereafter,[38] the "survey was not a scientific survey of the patients but is the only one which has been done", and conceded, "It is impossible to determine precisely how many would return." No definite commitment

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[36] Stipulation, p. 2.

[37] E.g., Naia and Harada.

[38] Plaintiffs' Proposed Findings of Fact re Ninth Circuit remand, p. 5.

was called for by the question as presented to the patients. An overwhelming majority of the patients responding were permanent residents of Kalaupapa, who would come to Honolulu on such occasions as their own particular needs might call for. Punikaia's participation in the survey makes even the "preference" responses suspect. His activities in attempting to keep the state from closing the Clinton Building is common knowledge among the patients.[39]

After hearing Harada and Punikaia, this court could give no weight whatsoever to the survey as giving any facts upon which this court could evaluate any of the underlying *issues*.

> 3. "c. What would be the cost to the State of reinstating and providing water and utility service, food delivery, telephone services, medical supplies, and nursing and janitorial services? How do those costs compare to the cost of providing care for the plaintiffs if they were at Leahi Hospital?"

The cost of providing water to the Clinton Building could not be specifically determined, but the plaintiffs estimated it would be less than the $130 per month now being spent by the state for water service to the Trotter Building and patients' cottage at Leahi. As the plaintiffs also admitted, the cost of medical supplies per individual is unknown, but both parties agree that the utilities and other costs would be essentially the same as those at Leahi. It was stipulated that the cost of providing the services at Leahi would be: (1) To purchase and prepare three meals a day, the cost is $10.20 per patient/day. If 10 of the plaintiffs lived in the Clinton Building all of the time, this would run to about $37,000 per year. (2) For medical supplies, viz., including dressings, medication, etc., and excluding personnel costs, equipment and transportation costs relating to providing medical services, it was stipulated that there should not be any significant difference between the cost per patient for providing medical supplies at Leahi as opposed to Hale Mohalu. The cost budgeted for 10 nurses at Leahi for

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[39] Testimony of Punikaia.

fiscal year 1981-82 is $185,000. The plaintiffs requested, in their Motion for Temporary Relief, that the state provide one nurse per shift, around-the-clock (i.e., 3 shifts per day, 7 days per week). It was estimated that this would require the employment of 4.2 nurses, at a cost of about $77,000 per year. For janitorial services, the cost budgeted for 2 custodians for fiscal year 1981-82 is $22,620. The plaintiffs requested that the general janitorial services they felt required at Hale Mohalu would be about one day per week. The cost for this, therefore, would be $2,000 per year. The electrical service required would cost about $940 per month (over $11,000 per year). For telephone service, the cost would be about $128 per month (over $1,500 per year).

From the above, it can be seen that at present it is costing the state over $250,000 per year to maintain Leahi as a skilled nursing facility. For maintaining the leprosy patients from Kalaupapa,, as plaintiffs have requested in their Motion for Temporary Relief, the cost would be over $120,000 a year.

The above attempts of this court to answer this specific question of the *Punikaia* panel does not properly reflect the situation facing the state in respect to caring for leprosy patients. The leprosy patients, particularly the "old-timers" from Kalaupapa, are very susceptible to other chronic diseases and afflictions. Because of loss of sensitivity in their hands and feet, they can receive injuries to the same, e.g., burning, cutting, smashing, etc., without being aware of the injury. For these reasons, leprosy patients require higher levels of care and treatment than plaintiffs requested in their prayer for relief, or are inferentially contained in the questions of the appellate court. These "old-timers"—and every one of the plaintiffs are "old-timers"—are the older patients whose faces, hands, and feet show the ugly erosion of the body that leprosy brought about before the new drugs were discovered, and who are subject to chronic physical ailments. They, thus, require a higher level of care and treatment than is necessary for most of the 600 or more leprosy patients now living in the community. The services requested by the plaintiffs in their prayer for

relief are actually inadequate to provide the care necessary for the "old-time" leprosy patients. All of those basic, needed services can now be provided most adequately at the Leahi facility.[40]

The preceding comparison of costs does not portray the entire factual picture involving the use of the Clinton Building. Even to provide space for an average of 15 occupants, that building is in such a "rotten" condition[41] that the entire second floor would have to be torn off. Over half of the rooms on each wing of the first floor are also unsalvageable. Those wishing to use that facility, perforce, would have to be removed therefrom for the months necessary to tear down and essentially completely rebuild a portion of the first floor. Any such building would have but limited use and a short life span.[42]

As of the present time, any such structure would not meet the needs of the present residents at Leahi. Leahi offers inpatient care services, and Leahi Hospital would have to continue to be operated even if the plaintiffs were successful in this suit. To incur the cost of operating facilities at Leahi and Hale Mohalu would be, to this court, fiscally and administratively unsound and inefficient. The cost of renovating and reestablishing the Clinton Building, when measured against the use now made thereof, or even the cost of merely meeting plaintiffs' demands. as outlined, would be prohibitive.[43] The cost of running two institutions, one for the purpose of providing a hostel for leprosy victims transitorily present in Honolulu, could only be justified if one were to adopt the rationale of Sister Maureen Keleher of St. Francis Hospital, i.e., that they should be given everything they want.

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[40] Fact Stipulation, p. 4; testimony of Drs. Waite, Worth, and Dodge.

[41] See pictures, Defendant's Exhibit [illegible].

[42] Testimony of Earl Hunter.

[43] Testimony of Chaty Hunter, Drs. Waite and Bomgaars, and Defendant's Exhibit #23.

4. "d. Are the buildings that constitute the living facilities at Hale Mohalu an imminent hazard to life and health? If so, what would be the cost of making the facility reasonably safe for temporary use pending a final decision in this case?"

At the present time, the Clinton Building is unsafe for human habitation and clearly constitutes a hazard to the safety of anyone entering that building.[44] James Early, a structural engineer retained by the plaintiffs, testified as to an earlier inspection of Hale Mohalu that he had made in 1977, and stated that the building even then was unsafe and dangerous.[45] He testified that he cannot determine the present extent of termite damage, but that it would be equally foolhardy to state that the building is any safer now than it was in 1977.[46]

At present, no one uses the second floor of the Clinton Building. Electrical current to that floor has been cut off. On the first floor, only the central lobby area, a few adjoining dormitory-type rooms, an adjoining kitchen, and four lavatories are used by the plaintiffs. The rest of the ground floor rooms are not used.[47]

Clinton Hall was always roofed over with composition roofing paper. The roofing material is now worn out and the supporting sheathing under it suffers from wood rot, termite damage, and water damage. The same eroding factors have destroyed the structural integrity of not only the roof, but also of the supporting rafters and nailers underneath the roof covering The roof sags. It has a multitude of holes in it. Through the holes and cracks runs water leaking down through both floors to the ground beneath. Plaintiffs, in an endeavor to

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[44] Testimony of Stan Char; see Exhibit #27.

[45] See note #14, *supra*.

[46] Testimony of Early; see Exhibit #1.

[47] Testimony of James Early, Thomas Ryan, Stan Char, and Bernard Punikaia.

try to divert some of the water and drain the same through the windows, have suspended plastic sheets from the ceiling and draped them over and out of windows.[48]

The second floor is termite infested. The walls, the supporting studs, and about 50% of the floor have been so damaged by termite and water that in many places one can easily put his foot through the floor. The live termites are active and visible.[49] The first floor of the building is also termite-ridden. Ground termites normally infest a building from the ground up. Thus, more termite damage is expected to be found in the first floor than in the second.[50] The lobby areas on both the first and second floors are likewise termite infested and water damaged.

The first floor lobby, which apparently is the central living area of the plaintiffs, has the large columns which support the second floor and the roof. These columns have been so damaged by termites that they are unable to support the weight of the floor and roof above. At the present time, they are shored up by outside timbers in order to sustain some of their supporting ability. One of the main columns of this first floor lobby area is so badly eaten by ground termites that an 8-inch ice pick probe was easily pushed into the column up to the handle without meeting any resistance from what should have been a solid wood column.[51] The ceilings on both the first and second floor are made of canec, a cane fibre board formerly made in Hawaii but now no longer manufactured. At present, over 50% of the ceiling panels are either hanging loose from the ceiling or have fallen down on the floors below exposing the rotting nailers and rafters above.[52] The staircases and ramps both

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[48] Testimony of Stan Char; Defendant's Exhibit #27.

[49] Testimony of Stan Char.

[50] Testimony of Stan Char.

[51] Testimony of Char and Defendant's Exhibit #27.

[52] *Ibid.*

inside and outside the building are in such rotted condition that they are no longer usable. There are large holes in the stairs. The stair railings are either termite damaged or are no longer in existence.[53] The sidings are termite infested, as are many of the studs behind the walls which support the building.[54]

James Early testified that termite damage is not always visible, and he stated that when inspecting the building at the request of the plaintiffs, he did not probe into the support columns in the lobby, did not go on top of the roof, did not examine behind walls; nevertheless, he found evidence of active termites within the building. Early noted that one of the main support columns in the first floor lobby was buckling and testified that the extent of termite damage greatly affects the structural integrity of the building.[55]

Joseph DuPont, called by the plaintiffs as a waterproof consultant, testified that the roof over the Clinton Building could be repaired on a temporary basis with an expectation that it would last a year at a cost of between $15-$20,000. For a more permanent roof covering, it would cost $30-$35,000. DuPont testified he was not a structural engineer and did not know the structural integrity of the roof. He had made no inspection of the supporting framework of the building under the roof. He admitted that he had found the roof in poor condition with pits and visible sags. He stated that he had not seen any holes on the roof. This statement alone renders his testimony somewhat suspect because structural engineer Char, and more particularly the photographs contained in Defendant's Exhibit #27, show the holes in the roof. DuPont admitted that if the roof sheathing and its structural support were not safe, then re-roofing would not work.

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[53] *Ibid.*

[54] *Ibid.*

[55] Testimony of James Early; Plaintiffs' Exhibit #1.

The cost of repairs necessary to meet the minimum standards required under the building codes of the City of Honolulu and State of Hawaii for the use of the building as a skilled nursing facility was estimated to be in excess of $1 million. Earl Hunter, architect and cost estimator, testified that the present cost would be $880,000 for construction, plus $72,000 for consultant services and design cost, $33,000 for staff costs, and $25,000 for the design contingency costs. These figures, as Hunter testified, do not include the cost of termite treatment necessary to attempt to rid the structure and ground of termites (approximately $20,000), the cost of repairs for exterior stairs or hooking up utility services, approximately $10,000. Additionally, the cost of furnishing equipment and other necessities for occupants of the building are not included in the figure. The cost required to make the necessary repairs and renovation to meet the minimum standards far exceeds the benefits which would be realized by the three plaintiffs now living in the Clinton Building. Presupposing that permits could be secured to allow partial repairs and renovations (and this appears highly improbable), even if the building were partially torn down and revamped to be but a portion of the first floor, the structural integrity of what was left, as repaired, would still be uncertain.[56]

The plaintiffs maintain that if some $1,200 were spent on labor and materials for shoring up the columns in the lobby area and installing metal bracing on the interior and exterior side walls, and $15-$20,000 were spent to install a single layer asphalt cap on the roof, and another $1,900 were spent to put the electrical system into safe operation, the Clinton Building could be put in a condition that it would not constitute an imminent danger to life and health.

Each of the witnesses who testified on the several items of repair, viz., Ryan, DuPont, and Honeychurch, indicated that such repairs could only be construed as temporary repairs.

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[56] Testimony of Char and Hunter.

From the evidence given to this court, this court, in all justice, could not, nor would not, order the state to spend any money on the Clinton Building in order to make the facility "reasonably safe for temporary use by the plaintiffs pending a final decision in this case". Any money so spent might better be tossed to the winds for the finders to keep.

"e. What is the nature of the facility at Leahi Hospital? What type of living accommodations are provided, and what restrictions are imposed upon the occupants?"

The parties have stipulated:

a. Leahi Hospital consists of a number of buildings occupying a one-block area in a residential neighborhood in Honolulu. The leprosy patients are housed in the Trotter Building, which is a one-story building on the hospital property. One wing of the Trotter Building is used for the leprosy patients, while the other wing of the building is unoccupied.

b. There are thirteen (13) patient rooms at Leahi Hospital, providing twenty-one (21) beds. There are six (6) single rooms, four (4) two-bed rooms, two (2) three-bed rooms, and one isolation room. Patients in single-bed rooms have their own bathroom facilities, those in multi-bed rooms share common bathroom facilities with the other patients.

c. In addition to the patient rooms there is also a day/recreation room, a doctor's office, a dispensary, a chapel, and a kitchen. There are also several staff offices in the facility.

d. The facility is in complaince with Life Safety Code requirements for its designated use.

e. Leahi Hospital provides limited acute care services,[2] skilled nursing care services, intermediate nursing care services, care home services, and out-patient services to persons who have contracted, or are suspected of having contracted, leprosy.

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2. Kalaupapa registry and Hale Mohalu registry patients who require general acute intensive care services

are admitted to a general hospital, usually Queen's Medical Center, or St. Francis Hospital, under the care of private physicians. Acute patients who can be cared for at Leahi Hospital are provided for at the facility.

In addition, evidence shows that the Trotter Building at Leahi Hospital is part of the state's leprosy program for the use not only by the Hale Mohalu registry patients, but also for Kalaupapa registry patients who come to Honolulu for medical purposes, as well as for those leprosy patients listed on the out-patient registry who, from time to time, may require medical care relating to their disease.[57] For any leprosy patient living at Leahi Hospital, the state provides total care and treatment. Total care includes providing housing, food, transportation costs related to medical care, full medical and nursing care including insulin shots, and clothing needs.[58]

Of those patients who were transferred to Leahi on January 26, 1978, none has indicated dissatisfaction with the Leahi facility or with the move itself. Some patients have indicated that living conditions at Leahi are better than those at Hale Mohalu.[59] Paul Harada, one of the plaintiffs in this case, testified that Leahi is beautifu".

The same house rules and state regulations which were in full force and effect on the leprosy patients living at Hale Mohalu before it was closed on January 26, 1978, remain the same restrictions now imposed on the patients in the Trotter Building and its cottage at Leahi.[60] Those presently using the Clinton Building, of course, have no such restrictions. Their restrictions are only those which they impose upon themselves. Thus, they can, and do, have dogs in the building with them and have a horse tied on the grounds outside. They can throw parties at any time and on any occasion and under any

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[57] Testimony of Dr. Bomgaars.

[58] Testimony of Drs. Bomgaars and Waite.

[59] Testimony of Drs. Waite, Koch, and Richard Young.

[60] Fact Stipulation; Exhibits A and B.

circumstances as they so desire. Of course, they would not have that same unrestrained freedom of action and from responsibility if they were living at the Leahi facility.

6. "f. Are the plaintiffs who have already moved to Leahi Hospital suffering disadvantages that they would not have suffered at Hale Mohalu?"

As to other claimed disadvantages, the plaintiffs maintain that the patients who moved to Leahi Hospital suffered "the disadvantages of being subject to the stress and trauma of their actual relocation and the disadvantage of being in a hospital atmosphere", and "of being denied to them 11 acres for recreational purposes, a garden, and horses", and that those now at Leahi are suffering from the disadvantage of being separated from those who didn't move with them.

It must be noted that the above-claimed disadvantages apply only to those patients now using the Leahi facility. Those patients, however, are not the plaintiffs in this case.

Contrary to the plaintiffs' claims, the doctors who were treating the patients at Hale Mohalu before its closure on January 26, 1978, testified that there were no significant changes in the medical or physical condition of the patients after their move. The doctors' records substantiate this testimony. All of the patients had other chronic diseases and there did not appear to be any acceleration of any of their medical conditions following the transfer.[61] Those same doctors testified that they had not observed any stress or increase in stress because of the move, nor did they find anything in the medical records to indicate any such stress or increase in stress.

The state presented three statistical studies of the mortality rates of leprosy patients who had been transferred. One compared the expected number of deaths of those transferred or subject to transfer to the general Hansen's disease population. Another study compared the death rates of all Hansen's dis-

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[61] Testimony of Drs. Waite and Koch.

ease patients before 1969 to those of Kalaupapa and Hale Mohalu after 1969, and the death rate of all Hansen's disease patients from 1955 through 1968 to those same patients after 1969. Based upon the above testimony, as well as that of Don Harris and defendant's Exhibit #20, this court could find no significant statistical difference in the mortality rates of those whom plaintiffs claimed were traumatized by the threat of or actual moving of the Hale Mohalu patients in January 1978.

Dr. Robert Worth, who testified on behalf of the plaintifs, stated that all of the leprosy patients "are masters at adaptation", and that those who were moved to Leahi would be expected to successfully adapt to their new environment.

This court finds that those who moved to the Leahi complex have not suffered any fundamental disadvantages because of the transfer. Actually, the Leahi complex is much more adapted to give to leprosy patients the quality of their needed care than was ever possible at the Clinton Building.

7. "g. What is the source and nature of the food, medical and utility services presently available to the plaintiffs at Hale Mohalu? To what degree do these provisions adequately serve the plaintiffs' basic needs?"

The plaintiffs provide and prepare their own food. They pay for their food out of their own funds, with cash gifts from persons in the community, from funds raised by conducting bazaars and luaus, and some donations of foodstuffs by their friends.[62] No medical services are provided at the Clinton Building. Any leprosy patient, whether a plaintiff or not, will be treated on an out- or in-patient basis at Leahi. If acute care is required, any leprosy patient will be admitted to a general hospital and the cost of all medical services are assumed by the state.[63]

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[62] Testimony of Ms. Sandy Galavin and Bernard Punikaia.

[63] Stipulation, *supra*.

In September 1978, the then Mayor of Honolulu was a candidate for the Democrat's nomination for Governor of the state. When the state, with the approval of the incumbent Democrat governor, cut off the electrical and water services to the Clinton Building, the mayor immediately authorized connection of a water line to a city fire hydrant and supplied a city electrical generator to those then occupying Hale Mohalu. The plaintiffs purchase the fuel for the generator out of their own funds. The gas used to heat water in a single water heater is propane, purchased by the plaintiffs out of their own funds. The patients have had a single telephone line installed at their own expense. No janitorial services are provided by the state.

In addition to the state-provided medical services indicated above, some of the plaintiffs are eligible for, and receive, pensions from the state, and all of the plaintiffs receive cash allowances, food allowances, and clothing allowances from the state. The average total amount received by each plaintiff is $260 per month.

One of the plaintiffs, Frank Duarte, is diabetic and must have daily insulin injections. Because he has lost some of the sensation in his hands and portions of some of his fingers, he finds it difficult to administer the injections to himself. If a nurse were supplied, the nurse would do it for him. Nevertheless, without that assistance at the Clinton Building, Duarte has survived and still lives there.

> 8. "h. At oral argument before this court, the parties referred to a residential facility constructed adjacent to Leahi Hospital subsequent to issuance of the district court order. (The facility was variously referred to as a 'cabin' or a 'home-like facility.') How does the cost expended by the state to construct this facility compare to the cost of providing the requested basic services at Hale Mohalu? How do those construction costs compare to projected costs for necessary restoration or remodeling at Hale Mohalu, if any?"

The parties stipulated to a partial response to this question.[64] What is now the patients' cottage at Leahi was formerly quarters for nurses. In May of 1981, it was renovated and furnished by the state at a cost of some $63,000. It is a two-story building with 3 double rooms and 10 single rooms. One of the double rooms and 3 of the single rooms are located on the first floor. Patients with wheelchairs have access to those rooms, and there is room enough to maneuver the wheelchairs inside them. The cottage has been freshly painted, has excellent toilets, spacious rooms, and adequate furnishings. Plaintiff Harada testified that the Leahi cottage is "beautiful". Dr. Bomgaars testified that the rooms were pleasant, comfortable, and homey. The above conclusions are borne out by the pictures.[65]

The rules state that patients are allowed to stay in the cottage for no more than two weeks in one month, and no more than two consecutive weeks at any one time. However, patients are able to make arrangements with the administrator to stay, and have stayed, in the cottage beyond the two-week period.[66] As indicated, the same rules apply in the cottage as applied at the Clinton Building, i.e., visitors only in the living room and not in individual patient rooms; no pets or animals; no alcoholic beverages; and 10:00 p.m. curfew.

Plaintiffs Frank Duarte and Clarence Naia now go to Leahi Hospital to receive medical care and treatment, but neither has ever been in the cottage. Plaintiff Punikaia has examined the cottage. The cottage is for residential living only. Medical care and treatment for patients are supplied in the Trotter Building, which is also on the Leahi Hospital grounds. The only patients permitted to use the cottage are those who do not

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[64] Fact Stipulation pp. 8 and 9, and incorporated by reference herein.

[65] Defendant's Exhibit #18 and #31.

[66] Testimony of Dr. Bomgaars.

require more than out-patient medical care. If more than that is required, patients must reside in the Trotter Building. At the patients' cottage, the patients purchase their own food, prepare their own meals, and clean their own rooms. Linen, water, power, general custodial services, etc., are all supplied by the state.

The individual rooms at the cottage are furnished with bed, dresser, lamp, chair, and nightstand. The living room has a sofa, chairs, and a television set. As indicated, the building has been modified to accommodate handicapped persons. The bathrooms have handrails and modified lavatory equipment. There are two wheelchair ramps leading down from the front portion of the building—one leads to a lawn area, and the other to some steps leading up to the nearby street. Automobiles may be driven to where the lawn ramp ends. The interior stairway between the first and second floors has not been modified for wheelchair use.[67]

Since May 1981, the patients' cottage has been used nine times by leprosy patients.[68]

As indicated above, as early as 1969 it was recognized that the Clinton Building, with its 32,000 square feet of floor space, was much larger than was going to be needed to accommodate the 15-20 patients who might normally be expected to be in residence at the facility. A building of 5-8,000 square feet of floor space would be adequate for that patient census. Witness Earl Hunter testified that if the second floor of the Clinton Building were removed entirely and the ground floor demolished so as to leave about 8,000 square feet, and with the termite-eaten beams replaced, the cost of demolishing a portion of the building, together with design and construction costs, termite treatment, and utility connection costs, and inflation escalator of 8%, the present building could be remod-

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[67] Plaintiffs' Exhibits #17 and 35; Defendant's Exhibit #18; testimony of Dr. Bomgaars.

[68] Testimony of Dr. Bomgaars.

eled for about $142,000. It would then have a life span of between 7 and 12 years. A completely new building of the same size would cost between $230-$310,000. The above figures did not include furnishings. As indicated, it is obvious that the cost of renovating and furnishing the Leahi cottage was minimal compared to the cost estimated by Hunter for rebuilding any portion of the Clinton Building.

THE PRELIMINARY INJUNCTION PROBLEM:

The remand of the Court of Appeals orders this court to "make a new determiation on the issuance of a preliminary injunction". This court has in mind the appellate court's chart of "the correct standard for granting preliminary injunctive relief", viz., "the plaintiffs' burden is satisfied with a demonstration of either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in the plaintiffs' favor", as well as its insistence that the trial judge evaluate not alone the above, but also "(3) comparable hardship to defendant, and (4) effect on public interest".

This court's review of the past record, and contrary to the non-critical inferences made by two appellate panels, shows to this court that a state judge, two United States district judges, and a United States magistrate, each evaluated all of the required factors set forth by the appellate court, and each denied the plaintiffs any preliminary relief. It should appear obvious to anyone who was familiar with the factual background of this case that the plaintiffs' case is entirely without any merit whatsoever, and, as previously indicated, contrary to the inferences of the second appellate panel, even the first appellate panel did not decide that the plaintiffs' case had any merit.

As the preceding detailed facts should clearly have demonstrated, from the beginning the plaintiffs in this case were not permanent residents of Hale Mohalu. The permanent residence and homes of each and every one of the plaintiffs was, and is, at Kalaupapa. Not one came to Hale Mohalu from

Kalaupapa with the intention of making Hale Mohalu his permanent residence. It has been stipulated that the plaintiffs who lived in the Clinton Building after January 26, 1978, other than Punikaia, Duarte, and Naia, lived there "on a part-time basis", and "part-time basis" was stipulated to be defined as

> "patients whose principal place of residence is Kalaupapa Settlement, Molokai, who travel to Honolulu anywhere from two (2) to five (5) times per year, with each visit lasting from a few days to a week at a time, who reside at Hale Mohalu when in Honolulu. Patients who make less frequent trips, or who are living at Hale Mohalu less frequently, are not included."[69]

Each came because medical or other interests brought them from Kalaupapa to Honolulu. For them, Hale Mohalu was but a temporary hostel supplied and furnished by the state for their use while living in Honolulu before returning to their homes in Kalaupapa.

The Stipulation indicates that Punikaia, Naia, and Duarte are the only three plaintiffs now living in the Clinton Building who were there on January 26, 1978. Punikaia had arrived on that day solely for the purpose of protesting the closure of that facility. Of the presently named plaintiffs, only three more were there on January 26, 1978—David Brede, Mary Duarte (since deceased), and Francis Palea. Between January 26, 1978 and September 1, 1978, Bernice and Richard Pupule and Paul Harada had come over from Kalaupapa to Honolulu and moved into the Clinton Building. Neither Brede, nor Palea, nor the Pupules, nor Harada are now living in the Clinton Building. They have all returned to their homes in Kalaupapa. Only Punikaia, Naia, and Duarte remain in residence.

On the evidence, it is manifest that none of the plaintiffs here had any expectations that Hale Mohalu was designed or intended to be their "home". Each had no more than a "unilateral expectation" that whenever they were in Honolulu they would

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[69] Stipulation 1(b).

be able to live in the Clinton Building while they were temporarily away from their homes in Kalaupapa. At the present time, as stated above, neither Naia, Duarte, or Punikaia intended to give up their homes in Kalaupapa, and Naia and Duarte are going to leave the Clinton Building to return to Kalaupapa "as soon as this case is over". Punikaia comes and goes as is convenient to him. His "cause", now, is to try to keep a transient state-supplied hostel open for him and other patients from Kalaupapa when they are visiting Honolulu.[70]

It appears obvious to this court that the interests of the plaintiffs never did rise even to the level of the plaintiffs in *Moore* v. *Johnson*, 582 F.2d 1228 (9th Circuit 1978), and certainly "failed to rise to the level of a property or 'liberty' interest". Nothing in the acts of the state in closing the Hale Mohalu facility at Pearl City "seriously damaged [the] standing and associations in the community" of any of the plaintiffs. The Clinton Building was not the "community" of any of the plaintiffs. Their community was, and is, in Kalaupapa. Insofar as "community interests" are concerned, the only complaint which any of the plaintiffs has made against moving is that the terrain around the Clinton Building is flatter and therefore easier for them to negotiate, the stores are closer than they are at Leahi, they feel more comfortable when they go in the stores in that area, and the Leahi facility has a more sterile feeling.

This court heard the testimony of Punikaia, Duarte, Naia, and Harada, and observed them physically. While each shows some of the scarring and maiming which formerly accompanied the progress of leprosy, i.e., loss or malformation of fingers and toes, malformation of facial bones, not one is at all grotesque in appearance. Not one would cause even the most sensitive to recoil in horror. Rather, the appearance of each would cause nothing more than a momentary wonderment as to what

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[70] When at the HSHCC public meeting on November 17, 1977, "Punikaia was asked if the patients would stay at Hale Mohalu even if the building was unsafe. He answered, 'Yes'." Minutes of Meeting.

brought about their physical condition. Nevertheless, all of the above, save Naia, are fully ambulatory. Naia is now using crutches.

Dr. Worth has equated the condition of the plaintiffs with "slavery." This, of course, is a pure emotional reaction not warranted by any objective analysis of their situation. Nothing that the Hawaiian society ever did caused the plaintiffs to be infected with leprosy. These plaintiffs, "old-timers," were forcibly segregated from their family, siblings, and community with two objectives in mind: (1) that society might give to them a home, food, clothing, and medical care for the rest of their lives, and (2) that they would not be able to pass along to their siblings or their fellow citizens the disease of leprosy. Society has always, and still continues to fulfill this obligation. Now drugs have arrested what formerly was an inexorably destructive disease and has rendered those having it non-infectious. Today, if so desired, each and every leprosy patient can leave Kalaupapa or Leahi and return, with no societal restraints, back into their families and the community. The plaintiffs are now receiving more assistance from the people of Hawaii than is given to those suffering, for example, from muscular dystrophy, or cancer, or heart attacks. The cry of the present plaintiffs is that they want more. The present plaintiffs want not only the restoration of "their" hostel at the Pearl City location, they want the use of the entire eleven acres for themselves. They want to be free from any restraints in the way in which they will use the hostel or the eleven acres.

The plaintiffs here, similarly to the plaintiffs in *Moore* v. *Johnson*, apparently believe that the state *must* furnish medical care and hotel facilities *to them at the specific facility of the Clinton Building*. Just as in *Moore* v. *Johnson*, their expectations far exceeded the duties that are imposed upon the state, i.e., the Board of Health, under Chapter 326 of the Revised Laws of Hawaii. Their expectations were, and are, but unilateral expectations, and, "as such, they are not property interests." *Moore* v. *Johnson*.

DUE PROCESS

Even if, in the face of the above analysis, an appellate court should not agree with this court's construction of the facts and applicable law and determines that some of the present plaintiffs did have a "property interest" in remaining in the Clinton Building on January 26, 1978, as shown above, and were therefore entitled to "due process" before they could be moved therefrom at that time,[71] the record indicates that all of the plaintiffs were provided adequate notice, opportunity to be heard, were heard, and were clearly and fully notified of the

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[71] The January 26, 1978 move is *not* the gravamen of plaintiffs' Amended Complaint. That Complaint specifically addressed itself only to the September 1, 1978 act of the state in cutting off all services to the Clinton Building. It is the plaintiffs' prayers for relief that contain broad sweeping requests for permanent and complete restoration of the Hale Mohalu program at the Pearl City plot, including, of course, the same full medical services now available at Leahi.

Counsel for the plaintiffs have persistently insisted on intermingling the evidence that might be solely relevant to the January 26, 1978 transfer with that of the September 1, 1978 cut-off of services. [Cf. Plaintiffs' Exhibits #37 and 38.] None of the plaintiffs, past or present, ever were transferred! The "cut-off" was seven months *after* what the plaintiffs characterize as a coercive move. [Plaintiffs' Memorandum Re: Remand filed January 18, 1982, p. 10.] Nevertheless, the *Brede* court concerned itself with "transfer trauna".

The *Punikaia* court observed that "the relief expressly sought by the plaintiffs is . . . restoration of minimal services including water, electricity, telephone, the services of one nurse, medical supplies, and limited janitorial services. [Order, p. 2.] That court noted that plaintiffs "characterized the relief sought as an injunction that prohibits the termination of vital services and thus maintains the status quo as it existed prior to the state action." [Ibid.] Just which state action was being referred to by the *Punikaia* court is not clear to this court. The "Order" principally, but not entirely, seems to concern itself with the complaint of the *present* plaintiffs. So does this decision.

proposed state action long before and up to the very day of intended transfer. Contrary to the position taken by plaintiffs' counsel during the hearing, due process does not require that hearings be "conducted in a trial-like atmosphere complete with attorneys to challenge offered evidence and legally trained hearings officers to rule on evidentiary questions."[72]

As set forth in particularly above, as early as 1969 the Citizen's Committee on Leprosy, with now plaintiff Punikaia representing the residents of Kalaupapa, and another leprosy patient, Anita Una, representing the residents of Hale Mohalu, concurring, recommended the closure of the Pearl City facility and the transference of its operations to the vicinity of Leahi Hospital. It has been stipulated that the plaintiffs received advance notice of and attended at least 4 hearings in 1977 before the SHPDA, which hearings were on the evaluation of the planned transfer of the Hale Mohalu program to Leahi Hospital. The SHPDA is an independent agency not a part of the state Department of Health. At some of those hearings, plaintiffs were represented by an attorney. It was only after nine hearings that the SHPDA granted a Certificate of Need authorizing the state to close Hale Mohalu and transfer its operations to Leahi.[73]

The Department of Health also held other informal hearings on the proposed transfer. At the February 7, 1977 hearing at Hale Mohalu, the Department of Health went over its transfer plan with the leprosy patients—Bernard Punikaia was there and commented. On May 4, 1977, a public hearing was held at Leahi Hospital. Again, leprosy patients were present and were given an opportunity to speak on the proposed transfer.[74]

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[72] Toney v. Reagan, 467 F.2d 955, 958 (9th Circuit 1972), *cert. denied* 409 U.S. 1130 (1973). *See also*, Dixon v. Love, 431 U.S. 105, 115 (1977).

[73] Defendant's Exhibit #10.

[74] Defendant's Exhibit #2.

At the state Certificate of Need Review Panel Meeting of November 8, 1977, on the problem of transfer of facilities, Punikaia and five other patients from Hale Mohalu were present and were heard. At the November 17, 1977 meeting of the HSHCC, as noted heretofore, Punikaia, his attorney, and Representative Abercrombie were present and were heard, just as they were at the Committee's meeting of December 1, 1977.

In December 1977, the Department of Health was faced with the Fire Safety Violation citations issued by the Fire Chief of the City and County of Honolulu.[75] The Clinton Building could no longer be used as a skilled nursing facility, and it was then (and presently is) unsafe for human habitation.

On January 12, 1978, almost every patient then living at Hale Mohalu and Kalaupapa received the Department of Health's notice that the care program would be moved to Leahi "on or about January 23, 1978."[76] As stated above, Punikaia's state court suit for an injunction was immediately filed, thereafter heard, and on January 25, 1978, his prayer for a preliminary injunction was denied.

All of the Hale Mohalu registry patients, i.e., those who had no Kalaupapa homes, moved to Leahi Hospital on January 26, 1978. Only some of the present plaintiffs stayed behind as sit-ins to prevent the Clinton Building from being entirely shut down. As stated above, only six plaintiffs who were in the Clinton Building on January 26, 1978, were still there on September 1, 1978, viz., Punikaia, Naia, Mary and Frank Duarte, David Brede, and Francis Palea. The Pupules and Harada moved into the Clinton Building between January 26 and September 1, 1978.[77] The Board of Health clearly fulfilled any obligation it might have had to the plaintiffs in its efforts to

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[75] Defendant's Exhibits 5, 6, 8, 9 and 29.

[76] Testimony of Young; Plaintiffs' Exhibits 11, 13, and 14.

[77] Brede and Palea have since moved out, and Mary Duarte, a plaintiff in *Brede* and *Punikaia*, is deceased.

involve them in the entire problem of the Hale Mohalu program and the transfer of that program to Leahi. The state gave *all* leprosy patients more than adequate advance notice of its proposed actions.

As this court views the facts and the law, the plaintiffs have no possible chance of success. Even if a shadow of possible success remained in this case, the only hardships of which the plaintiffs can now complain are that Leahi will not give them the same freedoms to use the facilities as *they* want to, e.g., visitors, pets, children, parties; that it is somewhat more difficult for them to go from the Leahi facility to shops; and that they believe that they will not find the same friendliness on the part of the shopkeepers in the Kaimuki (Leahi) area as they are now accustomed to in the Pearl City area. As is obvious, these "hardships" are minimal. If forced to rebuild or remodel the Pearl City facility as an 8,000 square-foot unit and furnish it, as now requested by the plaintiffs, its minimal cost would be between $140-$200,000. To staff and service it as requested would call for a budget of about $120-$130,000 per year for water, utilities, nursing and custodial expenses, plus more for medical supplies and services.[78] The state would still be compelled to maintain the Leahi facility to take care of non-Kalaupapa registered patients and to furnish them the necessarily much higher degree of medical care they require than could be provided at the "new" Pearl City hostelry.

To be sure, the state's hardships can be said to be only financial, but those financial hardships fall upon every inhabitant of the state. The position of the plaintiffs is grossly unreasonable. The plaintiffs here are suffering no "irreparable injury." Each and all have used and intend to use the Pearl City facility as their Honolulu motel. The new cottage at Leahi gives them everything that they ever have had in the Clinton Building, except flatter lands, closer stores, and the present absolute freedom of action now enjoyed by the completely

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[78] Stipulation, 3c(2), p. 5.

unrestricted use of the Clinton Building and surrounding grounds.

The public interest on the part of the handful of supporters of those still living in the Clinton Building is that engendered by the emotional response to the "poor, unfortunate victims of leprosy." They completely ignore the general public's interest in the reasonable and necessary use of the state's tax dollars. As was evidenced by the record of the public hearings on the subject of transfer, and the evidence on the record, the leprosy patients from Kalaupapa will be given more than adequate care and services at Leahi. The eleven acres at the Pearl City facility are no longer needed as a garden, horse pasture, or playground for the 15 or so patients who intermittently come to Honolulu from their homes at Kalaupapa. The plaintiffs' prayer for a Preliminary Restraining Order must be, and is, DENIED.

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT:

On November 30, 1981, plaintiffs moved for "partial summary judgment as to defendant's liability on those claims [in Plaintiffs' Amended Complaint] which alleged denial of due process," together with a memorandum in support of a motion. Defendant, on December 11, 1981, filed a Memorandum in Opposition to that Motion. Because it feels that the evidence and record are complete enough, this court chooses to rule thereon, without argument.

Plaintiffs maintain they have "not one but many legal entitlements amounting to property interests and therefore are entitled to due process before any of those property interests could be altered, reduced or terminated." Plaintiffs maintain that

> . . . the only relevant facts are those concerning the manner in which defendants perpetrated a non-judicially sanctioned, life-threatening and unilateral shutdown of Hale Mohalu and the fact that no judicial process (including no witnesses under oath, no power to compel attendance of

witnesses, no cross-examination, etc.) was ever afforded plaintiffs. These facts are uncontroverted.

It is clear from this court's preceding analysis of the facts that plaintiffs' statement that "these facts are uncontroverted" is unsupportable. Plaintiffs' first argument is that their claim of entitlement was more than a unilateral expectancy because Hawaiian Revised Statutes Sections 326-11 and 326-2[79] mandated the maintenance of Hale Mohalu in the Clinton Building as long as Kalaupapa was in existence. H.R.S. § 326-40 expressly states that it is "the policy of the state that any patient a resident of Kalaupapa desiring to remain at the Settlement shall be permited to do so for as long as he may choose, regardless of whether or not he has been successfully treated" (Act of 1977). Although the plan to move the Hale Mohalu program from the Clinton Building to Leahi had been before the Legislature since 1969 and, as indicated above, Representative Abercrombie had been at several of the public hearings on the subject in 1977, the Legislature did not give the same lifetime entitlement to those in the Hale Mohalu program that they gave to those who wished to maintain their home in Kalaupapa.

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[79] H.R.S. § 326-11 provides:

> Voluntary transfer to and from Kalaupapa. Any person undergoing treatment and receiving care for leprosy at Hale Mohalu on [June 30, 1969] may be transferred to Kalaupapa Settlement for care and treatment if he desires. Any person who may undergo treatment and receive care for leprosy at Hale Mohalu after [June 30, 1969] may apply to the director of health for transfer to Kalaupapa Settlement.
>
> Any person undergoing treatment and receiving care for leprosy at Kalaupapa Settlement may be transferred to Hale Mohalu for care and treatment if he desires. A person transferred may be retransferred to Kalaupapa Settlement if he desires.

H.R.S. § 326-2 states:

> Every leprosy patient at Hale Mohalu and Kalaupapa shall be accorded as nearly equal care and privileges as is practicable under the different operating conditions of the two institutions.

This same claim of the plaintiffs was before the Circuit Court of Hawaii in the case of *Bernard K. Punikaia, et al.* v. *Yuen, Director of the Department of Health, State of Hawaii*, filed on January 20, 1978—six days *before* the state made the transfer of Hale Mohalu patients to Leahi. At the time of filing the suit, the circuit court granted a Temporary Restraining Order prohibiting the proposed transfer. The plaintiffs' Motion for a Preliminary Injunction was heard on January 25, 1978 before State Circuit Judge Shintaku, who then held—the day before the transfer took place—that plaintiffs failed to show a likelihood of success on the merits. The judge held specifically that H.R.S. § 326-11 related to transfers between Hale Mohalu and Kalaupapa Settlement only, and "clearly is not applicable to questions relating to transfers to Leahi Hospital." That court continued, "Section 326-3, Hawaii Revised Statutes, overrides other laws (including rules and regulations) and authorizes the Department of Health to make arrangements at Leahi Hospital for the care and treatment of any person within the state affected with leprosy." Judge Shintaku than ordered the Temporary Restraining Order dissolved and denied plaintiffs' Motion for a Preliminary Injunction.

Nevertheless, the same issue came up again before United States District Judge Wong in *Brede, supra*, who granted defendant's Motion to Dismiss and denied Plaintiffs' Motion for a Preliminary Injunction on September 21, 1978. On the claim of plaintiffs' entitlement because of the basis upon which the state acquired the property from the federal government, Judge Wong stated:

> There is no question in this case but that Plaintiffs have no standing to assert that the State has breached the conditions of the Quitclaim Deed. First, Plaintiffs were not parties to the Quitclaim Deed. Second, the State has acquired the unconditional fee interest in Hale Mohalu.
>
> Thus, Plaintiffs lack standing to claim that the State has breached its contract with the Federal Government.

On appeal, the *Brede* court affirmed Judge Wong in this respect in stating, "On appeal, appellants raise a number of

issues, most of which are without substantial merit." This claim was one of those issues so dismissed.[80]

Section 326-3 was passed in 1949 following an address by the then Governor Stainback to a joint session of the House and Senate in which the Governor called the legislators' attention to the efficacy of modern drugs in treating the disease with the result that leprosy was no longer a highly contagious disease. At that time, the Kalihi facility was still being used for the care and treatment of leprosy patients. It was in 1949 that Hawaii acquired the Pearl City site from the U.S. Government for the Hale Mohalu program. Section 326-3 was passed for the specific purpose of enabling the Department of Health to treat anyone with leprosy in *any* "hospital, nursing home, or convalescent home in the state, either public or private." Thus, the Department of Health could care for leprosy patients in Kalihi, Pearl City, or anywhere else in the state as the Department of Health might deem best. Thus, § 326-3 did not reaffirm and make even more clearly manifest the power given to the Department of Health under § 326-1 to "establish hospitals, settlements, and places as it deems necessary for the care and treatment of persons affected with leprosy," subject only to the approval of the governor. There is nothing in the language of the statute, and there is nothing to be found in the legislative history which even inferentially inhibits the Department of Health from moving the Hale Mohalu care program to any other site.

Plaintiffs also urge that § 27-6 of the Public Health Regulations[81] give to leprosy patients an entitlement not to be

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[80] *Brede, supra*, p. 410.

[81] Public Health Regulation § 27-6 states:

> The transfer of a patient from any hospital for the care and treatment of leprosy to any other hospital for the further care and treatment of leprosy or any other medical or surgical condition may be made upon recommendation of the attending physician and with the consent of the patient. If a medical or surgical emergency arises and the patient is incapable of being consulted, such transfer may be made without his consent.

removed from Hale Mohalu without their consent. Regulation 27-6 has never applied to the Hale Mohalu program, inasmuch as the Clinton Building was never a hospital within the definition of Regulation 27-6. The Clinton Building was always used only as a skilled nursing facility. The plaintiffs here gain no entitlement thereunder. Such claim is without merit.

Even if the term "hospital" were arbitrarily broadened to include a skilled nursing facility, it would not assist the present plaintiffs. None of them is now suffering from active leprosy, and none has any medical or surgical condition of the type that demands "an attending physician." Thus, the section could have no application to them. The state here did not attempt to move any of the plaintiffs for any medical or surgical reason.

Plaintiffs next ground for their Motion is based upon the claim of the "life-endangering effects of transfer." This "phenomemon" has been fully discussed, supra. This claim is without merit.[82]

The plaintiffs' next ground is that the plaintiffs have property rights as third-party beneficiaries to the deed from the United States to Hawaii of the buildings and eleven acres at the Pearl City facility. This same argument was made before the *Brede* court, which court, without mentioning it, rejected it among plaintiffs' grounds which were "without substantial merit."[83] The *Brede* court recognized that Hawaii held the property "in fee simple absolute."[84]

Plaintiffs' next ground is that the state's custom of providing continuous care and treatment at Hale Mohalu created more than a unilateral expectation on the part of the plaintiffs to remain there. Although the plaintiffs' brief would lead one to believe that these present plaintiffs have, for 30 years, had

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[82] O'Bannon v. Town Court Nursing Center, 447 U.S. 773.

[83] Brede, *supra*, 616 F.2d at 410..

[84] *Ibid.*

continued residency and treatment at Hale Mohalu, as the facts heretofore set forth below show, not one of the plaintiffs has had any "continuous" residency or treatment for 30 or any other years at Hale Mohalu. As heretofore set forth, only of Duarte, Naia, and Punikaia can it be construed that they have remained in "continuous" residency, and that alleged continuity has been covered above. All other plaintiffs are but part-timers. To reiterate, the continuous residency and treatment of the plaintiffs has been, and still is, at Kalaupapa. Thus, factually alone, this argument is without merit. Even presupposing that there had been 30 years intermittent but regular use of the Hale Mohalu program by the plaintiffs, the Court, in *Connecticut Board of Pardons* v. *Dumschat*, ___ U.S. ___, 49 U.S.L.W. 4711 (1981) and *Jago* v. *Von Curen*, ___ U.S. ___, 50 U.S.L.W. 3370 (1981) has held that the regularity of performance alone is insufficient to create liberty interests. Certainly in this case there was no mutually explicit understanding that the plaintiffs would be entitled to the use of the Clinton Building and the eleven acres around it forever and ever.[85]

In their Motion, plaintiffs have devoted three pages in painting a picture which would have the state *responsible* for the patients' "developing an extreme psychological dependence on the comfortable and private living environment" of Hale Mohalu. The inference is that the state somehow, having "saved the life of one drowning," is compelled thereafter to support that person in any manner he might desire. The argument admits that the state has done everything possible to ameliorate the physical handicaps of those afflicted with leprosy. When leprosy no longer became incurable but could be arrested and its possible infection of others stopped, the state offered to every patient an opportunity to live at Kalupapa for the rest of the patient's life with homes, food, clothing, and medical care supplied free-of-charge. The state also offered to assist leprosy

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[85] *Cf.*, Perry v. Sinderman, 408 U.S. 593 (1972).

patients with food, clothing, and medical care wherever they wished to live in the community. As is indicated by the activities of Bernard Punikaia, no longer are "lepers" "ostracized." Punikaia even attended Leeward College in Hawaii for some two semesters. The leprosy patients appeared at many of the public meetings, at Leahi, in the Board of Health headquarters, and at Hale Mohalu. There was no ostracization. The psychological impact urged by the plaintiffs in their brief simply was but verbal.

Plaintiffs' next basis for partial summary judgment is that this "termination of public utilities, particularly where such action may imperil the lives of such users, may not occur without prior judicial approval afforded after hearing." The plaintiffs here are apparently referring to the action of the state in cutting off food and medical supplies, as well as the water, light, and telephone connections to the Clinton Building on September 1, 1978. From January 26, 1978, when all leprosy patients in the Clinton Building, save those who refused to leave Hale Mohalu, were transferred to Leahi, until September 1, the state continued to supply those services and facilities to the Clinton Building. The state was thus obviously assisting and abetting those plaintiffs then living there to continue to live in a state buiding which the state knew was then unsafe for human habitation (and now is even more unsafe). As indicated above, on September 1 there were nine leprosy patients living at Hale Mohalu. Three of those had come into the facility *after* January 26, 1978. Not one of them had any "right or entitlement" to continue the occupancy of the premises, nor to free food, medicine, water, electricity, and telephone services at that location. Each had been given full notice of the fact that the services would be cut off on September 1, 1978. Each was given full opportunity to move to Leahi or to return to Kalaupapa. Each deliberately refused to do either. None, under the circumstances, had any entitlement to or an expectation of an obligation on the part of the state to continue to give them free food, medicine, and utilities in the Clinton Building.

Plaintiffs were not lessees, as considered in *Kaufman* v. *Abramson*, 363 F.2d 865 (1966). Their posture at that time was

nothing more than that of sit-in trespassers on state property. Plaintiffs' situation was in nowise akin to that of *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978). There was no Hawaiian statute mandating that the Board of Health could not cut off utilities to the Clinton Building other than for good and sufficient cause. Thus, there was no " 'legitimate claim of entitlement' within the protection of the due process clause."[86]

Plaintiffs next maintain that the plaintiffs had entitlements under the state's Landlord/Tenant and Public Housing statutes. As indicated above, on September 1 plaintiffs were not tenants in the contractual sense, with the state as the landlord. The only contract between the state and leprosy patients is that the state will, at all times, give leprosy patients a free home and care at Kalaupapa, and medical services for life. Only at Kalaupapa could they possibly be held to have a contractual relationship with the state.

Hale Mahalu was never a "public housing" facility. On September 1, the state owed no obligation to the sit-in trespassers to supply them with anything at the Clinton Building. The state fulfilled all of its obligations to the patients when they offered them housing care, and medical attention at Leahi or Kalaupapa.

Plaintiffs again would infer that the leprosy patients "have been forced to live on government property for most of their lives." This is not a valid statement of the facts. The only period upon which they were "forced to live on government property" was that period before the discovery of drugs that would arrest the spread of leprosy. After that time, leprosy patients could and can live anywhere they want to. Today, the vast majority of all leprosy patients in Hawaii live away from either Kalaupapa or the Clinton Building, or Leahi.

Plaintiffs never did enjoy a landlord/tenant relationship with the state, nor were they public housing tenants. The argument

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[86] *Memphis*, *supra*, at pp. 11 and 12.

of plaintiffs that they have entitlement under H.R.S. Chapter 360 "provisions applicable to public housing" or the Hawaii Landlord/tenant Law, H.R.S. Chapter 666, is without merit.

Plaintiffs next claim that 42 U.S.C. § 247e, which provides federal benefits for all leprosy victims, is a property interest from which the state cannot deprive them without due process. The relevant portion of § 247e provides:

> The [Public Health] Service shall, in accordance with regulations, receive into any hospital of the Service suitable for his accommodation any person afflicted with leprosy who presents himself for care, detention, or treatment. . . .

It is apparent on the face of the above section that there is nothing in its language to give to the plaintiffs the liberty or property interests which they claim. Nothing therein sets forth any substantive limitation on the discretion of those administering public health service for leprosy patients in their determination of which facilities such patients will be accommodated. Other than using such terms as, "Leahi Hospital is 'like a prison, " or "the rooms are smaller than the ones in the Clinton Building," or that they are subject to rules and regulations different from those they themselves have now set up at the Clinton Building, and that their access to retail facilities and services and outdoor activities are made more difficult at the Leahi site, plaintiffs have not, and cannot, point to any deficiency in the accommodations offered at Leahi to leprosy patients.

Plaintiffs argue that the plaintiffs have a "legitimate entitlement to *continued* receipt of unaltered benefits." No case supports such conclusion. *Moore* v. *Johnson*, *supra*, is to the contrary, and that court said,

> "The burden imposed upon the patients [in the Veterans Hospital] by the withdrawal or modification of benefits is not unusual. Similar burdens always attend an extensive distribution of benefits by the government; inescapably few get exactly what they want, while most, it is usually assumed, get more than they would have otherwise. All would get less if invariably the complaints of the many

> required elaborate hearings with all the trappings which only the lawyers and judges can fully appreciate."[87]

Plaintiffs' subjective claims of unsuitability here create no liberty or property interests.

Plaintiffs next maintain that H.R.S. § 326-1 gives the plaintiffs a "legitimate entitlement to medical care at a suitable facility." All that the *Brede* court said on this was that "the state has statutorily conferred upon leprosy patients an entitlement to treatment at *some* state leprosorium" [emphasis added]. That statement does not, in any way, erode the correctness of Judge Dick Yin Wong's holding in the district court hearing in 1978 that the Hawaii Revised Statutes do not negate the authority of the Department of Health to close Hale Mohalu and transfer its program to Leahi Hospital. In line with this court's prior discussion on H.R.S. § 326-1 and accompanying sections, plaintiffs' claims to the contrary are without merit.

In filing its Motion for Partial Summary Judgment, plaintiffs maintained that "there are no material facts in dispute with regard to these claims. Defendant's liability is established as a matter of law." As this court's above rulings on plaintiffs' claims indicate this court agrees that on the issue of the state's possible liability, there are no material facts in dispute. On none of the grounds stated have the plaintiffs shown that they have no standing. There is not one instance in which plaintiffs have been able to show that the state has violated any constitutionally protected liberty or property interests by its action in turning off the public utilities at the Clinton Building on September 1, 1978. They have shown no "legitimate claim to entitlement" as required by the *Board of Regents* v. *Roth*, 408

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[87] Moore v. Johnson, *supra*, p. 1234. In the same tenor are walker v. Hughes, 558 F.2d 1247, 1252, 1253 (6th Circuit, 1977); McDonnell v. United States Atty. Gen., 420 F.Supp 217 (E.D. Ill. 1976); Moody v. Daggett, 429 U.S. 78, 88, n. 9 (1976); Meachum v. Fano, 427 U.S. 215 (1976); Howe v. Smith, ___ U.S. ___, 49 U.S.L.W. 4715 (1981).

U.S. 564 (1972). The most that they have shown is a unilateral expectation that the Board of Health is under a legal duty to supply these Kalaupapa residents with care and medical facilities in the structurally unsafe, termite-ridden and run-down Clinton Building, together with exclusive use of the eleven acres surrounding it, under rules of their own making whenever they happen to be in Honolulu. As stated above, on September 1, 1978 the state did not owe to any of the sit-ins an obligation to supply them with services in the Clinton Building. They had no legal right to be where they were, let alone a legal right to force the state to keep supplying them free food, medical supplies, water, electricity, and telephone services at that building.

At no time did the state take any move—neither to transfer the program to Leahi, nor to cut off public utility services—without giving notice after notice after notice to the plaintiffs and all other Kalaupapa and Hale Mohalu registered patients of what the state was planning, how it would affect each and all leprosy patients, and the necessity for the proposed act. If the plaintiffs here had ever had any constitutional entitlement, the state had given to them all due process required before the state acted.

As heretofore noted, before ever the January 26, 1978 transfer of patients took place, the chief activist in this litigation, Bernard Punikaia, took legal action in an attempt to stop the proposed transfer. He and those other patients whom he then represented had a full hearing on his petition for a preliminary injunction. This was denied by the state trial judge.

Plaintiffs' Motion for Partial Summary Judgment is DENIED.

JUDGMENT:

This case has now been before four judges: one state and three United States district judges and a United States magistrate. Subsequent to the transfer, first Judge Wong found that the plaintiffs' claims were without merit. Three judges on the

Court of Appeals were unsure on the record of the correctness of that conclusion, and remanded it to this court to ascertain whether the plaintiffs had any entitlement. The matter was referred by Chief Judge King to the magistrate, who held a full hearing on the subject and whose findings of fact were, in fact, even if not by name, adopted by Judge King. Judge King, too, found that plaintiffs' claims, even as amended, were without merit. Again, another panel of the Court of Appeals failed to find, on the record, just what facts were evaluated by Judge King before he dismissed the complaint, and sent the case back for the second time for specific findings to the appellate court's specific questions.

This judge now has held hearings for five days, and at the end of the hearings this judge was even more convinced, if that were possible, than was state Judge Shintaku, United States District Judge Wong, Judge King, and Magistrate Young, that plaintiffs' claims were, and are, entirely without merit.

Plaintiffs have had very experienced and excellent legal representation. Their counsel have brought in every conceivable basis in order to establish some liberty or property interest that the plaintiffs might have in their continued use and occupancy of the Clinton Building. The state also has had excellent counsel. The efforts of counsel for both plaintiffs and defendants have produced an enormous quantity of typewritten material. The discovery and motion papers and other memoranda and documents in this case now occupy approximately two feet of filing space—this is exclusive of material presented to the Court of Appeals. The court believes all legal efforts should cease.

This judge feels that plaintiffs' suit should be concluded here and now. As seen above, plaintiffs filed a motion for partial summary judgment on the issue of their entitlement to due process. It is unnecessary for this court to wait for defendant to bring a cross-motion, particularly where, as here, the record is

exhaustively complete.[88] Therefore, based on the entire record and testimony that has come before this court, this court finds that, as a matter of law, plaintiffs have no standing, were not entitled to due process, and, if they were entitled to due process, the process accorded them was legally adequate. This court, sua sponte, under R. Civ. P. 56, orders that JUDGMENT BE ENTERED FOR THE DEFENDANT.[89]

DATED: Honolulu, Hawaii, March 5, 1982.

MARTIN PENCE

UNITED STATES
DISTRICT JUDGE

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[88] Factora v. District Director of the United States Immigration & Naturalization Serv., 292 F.Supp. 518, 521 (C.D. Cal. 1968); Wright & Miller, Federal Practice and Procedure: Civil § 2720.

[89] Wright & Miller, Federal Practice and Procedure: Civil § 2720.

APPENDIX B

JUDGEMENT ON DECISION BY THE COURT
FOR THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

CIVIL ACTION DOCKET NO. 78-0336

DAVID BREDE, et al.,

Plaintiffs,

vs.

GEORGE A. L. YUEN,

Defendant.

JUDGMENT
(On Decision of Remand, and Decision on Summary Judgment)

This action came on for evidentiary (hearing) before the court, United States District Judge Martin Pence presiding. The issues having been duly (heard) and a decision having been duly rendered, **it is ordered and adjudged** . . . that judgment be entered in favor of defendant and against plaintiffs.

FILED IN THE
United States District Court
District of Hawaii
MAR 29 1982
WALTER A.Y.H. CHINN, CLERK

cc: Mr. Robert M. Harris
Mr. Sidney Wolinsky
Mr. Phillip Moon

Dated at: Honolulu, Hawaii

Date: March 29, 1982
WALTER A.Y.H. CHINN, Clerk

Chief Deputy *Clerk of the Court*

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 78-0336

DAVID BREDE, *et al.*,

Plaintiffs,

vs.

DIRECTOR FOR THE DEPARTMENT OF HEALTH FOR THE STATE OF HAWAII, et al.,

Defendants.

MEMORANDUM AND ORDER

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 78-0336

DAVID BREDE, *et al.*,

Plaintiffs,

vs.

DIRECTOR FOR THE DEPARTMENT OF HEALTH FOR THE STATE OF HAWAII, et al.,

Defendants.

MEMORANDUM AND ORDER

On September 19, 1978, a hearing was held on the above-entitled cause regarding the Defendants' Motion to Dismiss the Verified Complaint and the Plaintiffs' Motion for Preliminary Injunction. For the reasons herein, the Court grants the Motion to Dismiss and denies the Motion for Preliminary Injunction.

The undisputed facts are that the State of Hawaii acquired title to a parcel of land known as Hale Mohalu at Pearl City, from the Federal Government pursuant to a Quitclaim Deed executed on March 23, 1956. Said Deed contained conditions which, *inter alia,* required the State of Hawaii to use Hale Mohalu as a public health facility for 20 years, reserving unto the Federal Government the right of re-entry for any breach of the conditions within the 21st year. The Federal Government did not exercise this right and thus, as of March 23, 1977, the State of Hawaii obtained unconditional fee simple title to Hale Mohalu.

The Department of Health, State of Hawaii, has determined to close the leprosy treatment program at Hale Mohalu be-

cuase it was in violation of life safety codes and transfer the same to Leahi Hospital in Honolulu.

This Court takes judicial notice that certain residents of Hale Mohalu filed a class action on January 20, 1978, in the Circuit Court of the First Circuit, State of Hawaii, which sought to enjoin the closing. *Punikaia* v. *Yuen*, Civ. No. 53577 (1st Cir. Haw.). In its February 21, 1978 Order Denying Plaintiffs' Motion for Preliminary Injunction, the Circuit Court basically held that the Hawaii Revised Statutes do not proscribe the authority of the Department of Health to close Hale Mohalu and transfer its program to Leahi Hospital.

On January 26, 1978, Hale Mohalu was officially closed and certain of the residents moved to Leahi Hospital. However, Plaintiffs, who are residents of Kalaupapa, have since moved into Hale Mohalu. In an effort to move Plaintiffs, the Department of Health terminated all medical, utility, and other services to Hale Mohalu on September 1, 1978.

On September 5, 1978, Plaintiffs filed this action and obtained a temporary restraining order requiring Defendants to "restore all electrical power, water, food and telephone service to Hale Mohalu. . . ."

Plaintiffs' Verified Complaint alleges three causes of action. First, they claim that they have a right to constitutional due process, pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, prior to any contemplated termination of utility and other services. Second, they claim that the termination of services and forcing them to obtain them at Leahi Hospital constitutes slavery, in violation of the Thirteenth Amendment. Finally, they claim that the Defendants breached their contractual agreement with the Federal Government, as embodied in the Quitclaim Deed.

DUE PROCESS

Whether and to what extent constitutional process may be due to Plaintiffs prior to their transfer from one medical facility to another or prior to termination of utility or other services

depends upon whether they have some "state law or practice conditioning such transfers [or termination of services] on proof of serious misconduct or the occurrence of other events." *Meachum* v. *Fano*, 427 U.S. 215, 216 (1976). Nothing in Hawaii law conditions the power of the Department of Health to close Hale Mohalu and/or transfer its patients to Leahi Hospital.

Plaintiffs rely upon Hawaii Revised Statutes § 326-11, which states that a Kalaupapa resident "*may* be transferred to Hale Mohalu for care and treatment if he desires." However, that section is overruled and superceded by § 326-3 which states that "*[n]otwithstanding any of the provisions of this chapter or of any other chapter relating to this subject matter*, the department of health may make arrangements for the care and treatment of any person within the jurisdiction at any hospital, nursing home, or convalescent home in the State. . . ." Section 326-3 therefore confers unlimited discretion on the Department of Health to make arrangements for the "care and treatment" of persons afflicted with leprosy, "[n]otwithstanding" § 326-11. This was the precise conclusion of the Hawaii Circuit Court in *Punikaia* v. *Yuen*, *supra*, in its denial of preliminary injunctive relief.

The pertinent Hawaii laws do not contain standards governing the Department of Health's exercise of discretion in the care and treatment of persons afflicted with leprosy. Therefore, since the closing of Hale Mohalu "did not implicate a constitutionally-protected 'liberty interest,' due process did not attach." *Wakinekona* v. *Olim*, ____ F.Supp. ____ (D. Haw. June 8, 1978), slip op., at 5.

Plaintiffs also claim that the State's receipt of federal funds for its leprosy treatment program triggers due process. However, the Defendants' discretion to administer those funds as they see fit precludes the implication of a constitutionally-protected liberty interest in having those funds expended at Hale Mohalu instead of Leahi Hospital.

SLAVERY

Since Plaintiffs are free to leave Hale Mohalu and enter or not enter Leahi Hospital, at their will, they have not stated a claim under the Thirteenth Amendment.

BREACH OF CONTRACT

In order to have standing to sue, a "plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). Thus, a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.*, at 499.

There is no question in this case but that Plaintiffs have no standing to assert that the State has breached the conditions of the Quitclaim Deed. First, Plaintiffs were not parties to the Quitclaim Deed. Second, the State has acquired the unconditional fee interest in Hale Mohalu.

Thus, Plaintiffs lack standing to claim that the State has breached its contract with the Federal Government.

In determining the propriety of preliminary injunctive relief, this Court is guided by the language in *Aguirre* v. *Chula Vista Sanitary Service*, 542 F.2d 779, 781 (9th Cir. 1976) wherein the Court held the following:

> "[A] preliminary injunction should issue '. . . upon a clear showing of either (1) probable success on the merits *and* possible irreparable injury, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief. . . ."

In light of *Aguirre*, this Court denies Plaintiffs' Motion for Preliminary Injunction. There is no likelihood—serious or otherwise—of Plaintiffs prevailing on the merits. The fact that Plaintiffs may move to Leahi Hospital shows that they will not suffer legally-cognizable irreparable injury.

The Plaintiffs' Motion for Preliminary Injunction is, accordingly, denied and Defendants' Motion to Dismiss is GRANTED.

DATED: Honolulu, Hawaii. SEP 21 1978.

DICK YIN WONG
JUDGE OF THE ABOVE ENTITLED COURT

APPROVED AS TO FORM:

JOHN F. SCHWEIGERT
JOHN F. SCHWEIGERT

Attorney for Plaintiffs